Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Keith O. Irby,	)	Date: July 24, 1996
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-253
	)	Decision No. CR427
The Inspector General.	)	
	)	

DECISION

I decide that I am without authority to hear and decide Petitioner's May 2, 1996 request for a hearing.

I. Background

On July 13, 1994, I issued a decision in the cases of Petitioners Keith and Michelle Irby. Keith O. Irby and Michelle P. Irby, R.Ph., DAB CR321 (1994). On August 10, 1994, Petitioner Keith Irby filed a request for "Appeal and Rehearing." Petitioner Michelle Irby did not request either an appeal or a rehearing in her case.

On August 25, 1994, I denied the request by Petitioner Keith Irby (whom I refer to hereinafter as "Petitioner") that I rehear his case. I considered Petitioner Keith Irby's assertions concerning findings I made in my July 13, 1994 decision in his case, and I concluded that my findings are amply supported by the record. On August 26, 1994, the Appellate Division of the Departmental Appeals Board docketed Petitioner's request for appellate review of my July 13, 1994 decision. On September 26, 1994, an appellate panel of the Board declined to review my July 13, 1994 decision in Petitioner's case.

On May 2, 1996, Petitioner wrote to me. P. Ex. 1.[1] In his letter, he requested "a complete departure from mandatory sanctions and suspensions imposed by the [administrative law judge], based on . . . new information and discovery --" P. Ex. 1 at 1.

Petitioner's May 2, 1996 letter is a request that I reopen and revise my July 13, 1994 decision in his case.[2] I directed the Inspector General (I.G.) to respond to Petitioner's May 2, 1996 letter. In her response, the I.G. argued that I am without authority to hear and decide Petitioner's request. On July 7, 1996, Petitioner submitted a rebuttal statement. P. Ex. 2. In addition, on July 8, 1996, Petitioner submitted a document entitled "Petitioner Conjunctive Relief and Deposition Request." P. Ex. 3.

II. Issue, findings of fact and conclusions of law

The issue is whether I have authority to hear and decide Petitioner's May 2, 1996 request to reopen and revise my July 13, 1994 decision. In concluding that I do not have such authority, I make the following findings of fact and conclusions of law (Findings). These Findings address only the question of my authority to hear and decide Petitioner's May 2, 1996 request to reopen and revise my July 13, 1994 decision in Petitioner's case. I make no findings concerning the merits of Petitioner's May 2, 1996 request that I reopen and revise my July 13, 1994 decision, inasmuch as I have no authority to do so. I discuss my Findings below, at Part III of this decision.

1. Petitioner requested Departmental Appeals Board (DAB) review of my July 13, 1994 decision in his case,

---

[1] Although Petitioner did not designate his May 2, 1996 letter as an exhibit, I have identified it as P. Ex. 1, because it appears to contain statements by Petitioner that Petitioner considers to be evidentiary. Likewise, I have identified Petitioner's July 7, 1996 and July 8, 1996 submissions as P. Ex. 2 and P. Ex. 3 respectively because they appear also to contain statements by Petitioner that Petitioner considers to be evidentiary. For purposes of making a record, I am receiving into evidence P. Ex. 1 - 3.

[2] Petitioner's letter is ambiguous, in that it might be construed to be a request that I reopen and revise my decisions in both his case and that of Petitioner Michelle Irby. However, Petitioner Michelle Irby did not sign the letter and she has not indicated that she desires that Petitioner Keith Irby represent her. I conclude, in the absence of an affirmative request from Petitioner Michelle Irby that I reopen and revise my July 13, 1996 decision, that Petitioner Michelle Irby has not requested that I reopen and revise my decision in her case.

and on September 26, 1994, the appellate panel declined to do so.

2. Petitioner made his May 2, 1996 request that I reopen and revise my July 13, 1994 decision more than 60 days after the date of the notice of the decision.

3. I do not have authority to hear and decide Petitioner's May 2, 1996 request to reopen or revise my July 13, 1994 decision in Petitioner's case under regulations contained in 42 C.F.R. Part 498.

4. I do not have authority to hear and decide Petitioner's May 2, 1996 request to reopen or revise my July 13, 1994 decision in Petitioner's case under regulations contained in 42 C.F.R. Part 1005.

III. Discussion

Petitioner made his original hearing request in 1990. The regulations which governed the conduct of hearings in cases involving the I.G., which were in effect prior to 1992, are at 42 C.F.R. Part 498.[3] Beginning in 1992, new regulations governing the conduct of hearings in cases involving the I.G. were published at 42 C.F.R. Part 1005.

The regulations contained in Part 1005 would appear to govern Petitioner's current request, because he made the request after the publication date of the Part 1005 regulations, and the Part 1005 regulations are procedural, and not substantive regulations. However, in order to be fair to Petitioner, and to be sure that there remain no open questions in his case, I have evaluated his request that I reopen and revise my July 13, 1994 decision under both the Part 498 and the Part 1005 regulations. I conclude that I lack authority under either Part 498 or Part 1005 to reopen and revise my decision in Petitioner's case.

A. The relevant facts (Findings 1 - 2)

I do not consider to be relevant here the facts that Petitioner alleges in his submissions dated May 2, 1996, July 7, 1996, or July 8, 1996. See P. Ex. 1, P. Ex. 2, P. Ex. 3. The issue before me is whether I have the authority to consider these alleged facts. As I discuss below, my authority to do so depends on the timing of Petitioner's request.

---

[3] The Part 498 regulations continue to govern hearings in cases involving the Health Care Financing Administration.

For purposes of this decision, the relevant facts are as follows. I issued my decision in Petitioner's case on July 13, 1994. Petitioner requested DAB appellate review of my decision, and the appellate panel declined to do so on September 26, 1994. On May 2, 1996 Petitioner requested me to reopen and revise my July 13, 1994 decision in his case. Thus, more than 60 days elapsed between the date of the notice of the July 13, 1994 decision and the date that Petitioner requested me to reopen and revise the decision on May 2, 1996.

B. Petitioner's request, considered under the Part 498 regulations (Finding 3)

Under 42 C.F.R. § 498.100(a), an administrative law judge or appellate panel decision may be reopened, within 60 days from the date of the notice of decision, upon the motion of the administrative law judge or the appellate panel or upon the petition of a party to the hearing.[4] The meaning of this section is clarified by 42 C.F.R. § 498.100(b), which provides that only the appellate panel may reopen its decision.[5] Where an appellate panel has issued a final decision in a case, only it has the authority to reopen that decision.

As I read 42 C.F.R. § 498.100, beginning on September 26, 1994, the date of the appellate panel's decision to decline to review my July 13, 1994 decision, I no longer had authority to reopen and revise my July 13, 1994 decision. The authority to reopen and revise that decision became vested with the appellate panel, inasmuch as its decision to decline review became the final decision in the case. 42 C.F.R. § 498.100(b).

Furthermore, even if I had the authority to reopen a decision which I had made in a case despite a subsequent appellate panel decision in that case, I would not have that authority here. My authority to reopen a decision ends 60 days after the date of the notice of the decision. Petitioner's May 2, 1996 request to reopen and revise my July 13, 1996 decision

---

[4] The text of the regulation refers not to the DAB, but to the "Appeals Council." The reference is to the Appeals Council of the Office of Hearings and Appeals of the Social Security Administration. The text was published at a time when the Secretary of the Department of Health and Human Services (the Secretary) had delegated authority to the Appeals Council to hear appeals from decisions of administrative law judges made pursuant to section 1128 of the Social Security Act. However, the Secretary has subsequently redelegated the authority to the DAB to hear and decide such appeals.

[5] As with the previous section, this section refers to the Appeals Council.

in his case was made more than 60 days after the date of the notice of the decision. Thus, I no longer have authority under 42 C.F.R. § 498.100(a) to reopen and revise my July 13, 1994 decision, and I may not consider Petitioner's request that I do so.

C. Petitioner's request, considered under the Part 1005 regulations (Finding 4)

Unlike the Part 498 regulations, the Part 1005 regulations contain no language relating specifically to reopening or revising an administrative law judge or an appellate panel decision. See 42 C.F.R. §§ 1005.4, 1005.20, 1005.21. The regulations provide that, unless appealed, an administrative law judge decision will become final and binding on the parties 30 days from the date that the administrative law judge serves the parties with a copy of the decision. 42 C.F.R. § 1005.20(d). The regulations provide additionally that a decision by an appellate panel will become final and binding 60 days from the date that it serves the parties with a copy of its decision. 42 C.F.R. § 1005.21(j).

A logical reading of 42 C.F.R. § 1005.20(d) is that it permits the administrative law judge to consider reopening and revising a decision during the 30-day time period prior to the decision becoming final and binding, or during the dates between the date of service of a decision on the parties and the date of appeal of that decision.[6] However, it is also logical to read the regulations as precluding the administrative law judge from reopening or revising a decision after that decision becomes final and binding or after DAB appellate review is sought.

Petitioner's May 2, 1996 request to reopen my July 13, 1994 decision was not made within 30 days of my serving a copy of that decision on him. Moreover, his May 2, 1996 request was made after he sought DAB appellate review. Therefore, I am without authority to hear and decide Petitioner's May 2, 1996 request to reopen and revise my July 13, 1994 decision under the Part 1005 regulations.

---

[6] I do not have authority to interpret regulations which affect the handling of appeals at the DAB. Therefore, I am making no decision concerning whether an appellate panel might have authority to reopen or revise its decision in a case, under 42 C.F.R. § 1005.21(j).

IV. Conclusion

I conclude that I have no authority to hear and decide Petitioner's May 2, 1996 request that I reopen and revise my July 13, 1994 decision in his case. Therefore, I dismiss his request for a hearing.

/s/

Steven T. Kessel
Administrative Law Judge