Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Raj Ahluwalia, M.D.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-342

ALJ Ruling No. 2013-11

Date: June 19, 2013

DISMISSAL

Petitioner, Raj Ahluwalia, M.D., is a California-based orthopedic surgeon, who wishes to challenge the effective date for his enrollment in the Medicare program, but he did not file his hearing request within the 60 days allotted by statute. The Centers for Medicare & Medicaid Services (CMS) moves to dismiss.

For the reasons discussed below, I dismiss as untimely Petitioner's hearing request.[1]

> ***Petitioner is not entitled to a hearing because he did not file a timely hearing request and no good cause justifies extending the time for filing.***[2]

Section 1866(h)(1) of the Social Security Act (Act) grants hearing rights to providers and suppliers of Medicare services "to the same extent as is provided in section 205(b)" of the

[1] CMS has submitted a motion/brief (CMS Br.) and four exhibits (CMS Exs. 1-4). Petitioner has submitted a brief (P. Br.) and three exhibits (P. Ex. 1-3).

[2] I make this one finding of fact/conclusion of law.

Act. Section 205(b) dictates that a petitioner's hearing request "must be filed within sixty days" after he receives notice of an adverse decision. Act § 205(b)(1); *accord*, 42 C.F.R. § 498.40(a). The statute itself does not require an administrative agency to extend this filing deadline, no matter how compelling the affected party's reason.[3]

Here, however, the applicable regulations include an exception to the 60-day filing deadline. They echo the statutory requirement that an affected party, who would be entitled to a hearing under 42 C.F.R. Part 498, must file his request in writing within 60 days of the day he receives notice of the determination that he wishes to appeal.[4] But the regulation adds that the administrative law judge (ALJ) may extend the time for filing, if he/she finds good cause. 42 C.F.R. § 498.40.

The regulations do not define good cause but leave that determination to the ALJ. *See Taos Living Ctr.*, DAB No. 2293 at 12 (2009) (holding that the ALJ "has discretion to extend the period for a facility to file . . . if . . . the ALJ finds 'good cause' for the late filing"). 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.[5] *See, e.g., NBM Healthcare Inc.*, DAB CR2500 (2012), *aff'd*, DAB 2477 (2012); *Michael Reiner, M.D.*, DAB CR2547 (2012); *Oak Park Healthcare Ctr.*, DAB CR1917 (2009); *Green County Care Ctr.*, DAB CR1716 (2007); *Casa Del Sol Senior Care Ctr.*, DAB CR1418 (2006); *The Heritage Ctr.*, DAB CR1219 (2004); *Hillcrest Healthcare, L.L.C.*, DAB CR976 (2002), *aff'd*, DAB No. 1879 (2003); *Roy Hollins/Western Reference Lab.*, DAB CR1055 (2003); *Hammonds Lane Ctr., et al.*, DAB CR913, *aff'd*, DAB No. 1853 (2002); *John Knox Village Care Ctr.*, DAB CR963 (2002); *Attalla Health Care*, DAB CR954 (2002); *Parkview Care Ctr.*,

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[3] Indeed, not all late requests for hearing under section 205(b) can be extended, even if the affected party has a very good reason for the late filing. Appeals of certain civil money penalties, assessments, and exclusions from participation in federal health care programs *must* be dismissed if not filed timely. The regulations governing those proceedings provide no exceptions. *See, e.g.*, Act § 1128(f)(1); 42 C.F.R. § 1005.2.

[4] Receipt of the notice is "presumed to be 5 days after the date on the notice unless there is a showing that it was, in fact, received earlier or later." 42 C.F.R. §§ 498.40(a)(2), 498.22(b)(3).

[5] 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(a), 404.933(c). SSA's regulations also provide an extensive list of non-inclusive examples of situations that may constitute good cause. *Id.* § 404.911(b).

DAB CR785 (2001); *Cmty. Care Ctr. of Seymour*, DAB CR758 (2001); *Meadowbrook Manor*, DAB CR764 (2001); *Sedgewick Health Care Ctr.*, DAB CR596 (1999); *Jackson Manor Health Care, Inc.*, DAB CR545 (1998); *Hospicio San Martin*, DAB CR387 (1995), *aff'd*, DAB No. 1554 (1996). In fact, as far as I can determine, this is the only standard articulated by any adjudicator.

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 Rehab. & Care Ctr.*, DAB No. 2094 at 6-7 (2007). Otherwise, it has not articulated any definition, but adjudicates case-by-case.

In any event, applying SSA's definition makes eminently good sense. SSA's regulations implement the same statutory provision as the section 498 regulations – section 205(b) of the Act. The SSA definition has been subject to notice-and-comment rulemaking. If anything, an adjudicator could justifiably hold potential providers and suppliers to a more stringent standard than that set forth in the SSA regulation. *See Cary Health & Rehab.*, 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).

Further, because no one, in this case or elsewhere, has proposed an alternative, I see no reason to depart from the most widely-employed standard for determining "good cause" in the context of a section 205(b) hearing. If an ALJ correctly applies the "good cause" standard 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.

Here, Petitioner Ahluwalia applied for enrollment in the Medicare Part B program. The Medicare contractor, Palmetto GBA, approved his application, effective February 20, 2012, with billing privileges from January 20, 2012. CMS Ex. 2. Petitioner Ahluwalia sought reconsideration, challenging the effective date. In a reconsidered determination dated **July 10, 2012**, the Contractor denied his request. CMS Ex. 4. The contractor's letter included notice of Petitioner's appeal rights, advising: "You must file your appeal within 60 calendar days after the date of receipt of this decision . . . ." CMS Ex. 4 at 1. The letter told him to submit his appeal to this office, and provided the address of the Civil Remedies Division of the Departmental Appeals Board, or, alternatively, to file his appeal electronically at the Departmental Appeals Board electronic filing system website. CMS Ex. 4 at 1-2. The letter also referred him to 42 C.F.R. § 498 for an explanation of his appeal rights.

Assuming five days for delivery of the notice letter, Petitioner's hearing request should have been filed no later than **September 13, 2012**. Petitioner faxed a hearing request to this office on **January 28, 2013**, well after the regulatory filing deadline had passed. His hearing request must therefore be dismissed, unless he shows good cause for the late filing.

Petitioner claims that, with the assistance of his billing service, he prepared a hearing request "[s]ometime between August 1, 2012 and August 13, 2012," and that the request "was mailed by [his] billing service . . . on or about August 13, 2012. . . ." P. Br. at 3; P. Ex. 2 at 2 (Turner Decl. ¶ 8); *see* P. Ex. 1 at 3 (Ahluwalia Decl. ¶ 14). After months had passed with no response, his billing service contacted the Departmental Appeals Board and learned that no request had been filed. It then faxed a copy of the request. P. Ex. 2 at 2-3 (Turner Decl. ¶ 9).

Based on these representations, I do not find good cause for Petitioner's untimely filing. Petitioner has not established that either he or his billing service ever mailed his hearing request. Petitioner claims no personal knowledge that it was mailed. He did not mail it himself, cannot identify the individual who purportedly mailed it, and does not know the date it was purportedly mailed. P. Ex. 1 at 3 (Ahluwalia Decl. ¶ 14). Instead, he shifts all responsibility to his billing service.

But James Turner, the general manager of Petitioner's billing service, is likewise unable to establish that he or anyone else from his service timely mailed the hearing request. All he can say with certainty is that it should have gone out with the office mail sometime after August 1, when it was dated. He does not claim that he mailed it himself; he does not identify the individual, or even the position of the individual, who purportedly mailed it. He does not explain the process by which his service insures that documents are mailed. He does not even know with certainty the date it was purportedly mailed. Instead, he refers to the "request dated August 1, 2012" having been "mailed by [his] office on or about August 13, 2012 . . . as part of our usual practice of collection and processing correspondence for mailing." P. Ex. 2 at 2 (Turner Decl. ¶ 8).

Petitioner well understood the importance of filing his hearing request timely. Doing so was within his ability to control. He did not take reasonable steps to assure that the request was timely filed. He waited months after the filing deadline before he contacted this office. He has therefore not established good cause for the late filing. *See SSA v. Parham*, Recommended Decision, App. Div. Dkt. A-07-109 at 5-6 (2007), *affirming* DAB CR1600 (2007), (in which the Board agreed that the affected party failed to show good cause where she "understood the nature and gravity of the proceedings" and "was capable of following the clear instructions in the Inspector General's notice to preserve her appeal rights"; the Board also found that a gap between the date on her hearing request and the date of mailing "called into question her credibility").

On motion of a party, or on his/her own motion, an ALJ may dismiss a hearing request that was not timely filed, if the time for filing was not extended. 42 C.F.R. § 498.70(c). Because Petitioner did not file his hearing request within 60 days of receiving the contractor's notice letter, and no good cause justifies my extending the time for filing, I grant CMS's motion and dismiss Petitioner's hearing request. 42 C.F.R. § 498.70(c).

/s/
Carolyn Cozad Hughes
Administrative Law Judge