

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

Denise A. Hardy, D.P.M.
Docket No. A-12-45
Decision No. 2464
June 11, 2012

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

Denise A. Hardy, D.P.M. (Petitioner) appeals the December 16, 2011 decision of Administrative Law Judge (ALJ) Steven T. Kessel dismissing Petitioner's request for a hearing. *Denise A. Hardy, D.P.M.*, DAB CR2478 (2011) (ALJ Decision). The ALJ found that Petitioner filed her hearing request more than two years after a July 22, 2009 initial determination by Wisconsin Physicians Service Insurance Corporation (WPS), an administrative contractor for the Centers for Medicare & Medicaid Services (CMS). *Id.* at 1-2. The initial determination by WPS revoked Petitioner's Medicare billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B) based on her guilty plea in the United District Court for the Eastern District of Missouri to Medicare and Medicaid fraud.¹ *Id.* at 3. The ALJ concluded that Petitioner did not show "good cause" for extending the deadline for filing her hearing request, and that dismissal of the hearing request pursuant to 42 C.F.R. § 498.70(c) was warranted. For the reasons explained below, we conclude that because Petitioner never sought a reconsidered determination by WPS, the initial determination was binding and Petitioner was not entitled to a hearing before an ALJ. Therefore, we affirm the ALJ's dismissal of Petitioner's hearing request, although on a different legal basis than the one relied upon by the ALJ.

Statutory and Regulatory Background

Section 424.535(a) authorizes revocation of a provider's or supplier's Medicare billing privileges as well as the corresponding provider or supplier agreement. A provider or supplier whose billing privileges are revoked is barred from participating in the Medicare program from the effective date of the revocation to the end of the enrollment bar set by CMS. 42 C.F.R. § 424.535(c). The enrollment bar must be for at least one year, but no more than three years. *Id.* Once CMS or one of its contractors makes an initial

¹ Revocation of a provider's or supplier's billing privileges results in the termination of the provider's or supplier's corresponding Medicare provider or supplier agreement as well. 42 C.F.R. § 424.535(b). Our use of the term "billing privileges" when referring to the revocation of Petitioner's billing privileges also refers to the termination of Petitioner's corresponding Medicare supplier agreement in effect at the time of the revocation.

determination related to the denial or revocation of a provider's or supplier's billing privileges and corresponding provider or supplier agreement, an affected party "may request reconsideration in accordance with [section] 498.22(a)." 42 C.F.R. § 498.5(l)(1). An "initial determination" includes "[w]hether to deny or revoke a provider[s] or supplier's Medicare enrollment in accordance with [section] 424.530 or [section] 424.535 of this chapter." 42 C.F.R. § 498.3(b)(17). An "affected party" means "a provider, prospective provider, supplier, prospective supplier, or practitioner that is affected by an initial determination or by any subsequent determination or decision issued under this part . . ." 42 C.F.R. § 498.2. If an affected party does not request reconsideration of an initial determination in accordance with section 498.22(a), then the initial determination is "binding." 42 C.F.R. § 498.20(b).

Section 498.22(a) provides:

CMS or one of its contractors reconsiders an initial determination that affects a prospective provider or supplier . . . if the affected party files a written request in accordance with paragraphs (b) and (c) in this section. For denial or revocation of enrollment, prospective providers and suppliers and providers and suppliers have a right to reconsideration.

Paragraph (b) of section 498.22 provides, in relevant part, that the request for reconsideration must be filed "[w]ithin 60 days from receipt of the notice of initial determination, unless the time is extended in accordance with paragraph (d) of this section." Paragraph (d), in turn, provides that the affected party must request an extension to the filing deadline in writing, and that "CMS will extend the time for filing a request for reconsideration if the affected party shows good cause for missing the deadline."

Once CMS or the CMS contractor issues a reconsidered determination, "CMS, a CMS contractor, any prospective provider, an existing provider, prospective supplier, or existing supplier dissatisfied with a reconsidered determination . . . is entitled to a hearing before an ALJ." 42 C.F.R. § 498.5(l)(2). The request for a hearing before an ALJ must be made in accordance with section 498.40, which requires in relevant part that the party requesting a hearing must be "entitled to a hearing under [section] 498.5" and "must file the request in writing within 60 days from receipt of the notice of initial, reconsidered, or revised determination unless that period is extended in accordance with paragraph (c) of this section." 42 C.F.R. § 498.40(a). The ALJ may extend the deadline for filing a hearing request upon a showing of "good cause." 42 C.F.R. § 498.40(c).

The regulations provide three circumstances when the ALJ may dismiss a hearing request "for cause": when a prior 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"; or when 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) (*italics in original*).

Case Background

The facts presented in this general background are undisputed and drawn from the record before the ALJ as well as the ALJ Decision. On March 13, 2009, Petitioner pled guilty to one count of defrauding the Medicare and Missouri Medicaid programs. CMS Ex. 2; CMS Ex. 3, at 1. The court sentenced Petitioner to three months of imprisonment, seven months of home confinement and two years of supervised probation and ordered Petitioner to pay \$89,298.20 in restitution to the Medicare and the Missouri Medicaid programs. CMS Ex. 3, at 2-5. On July 22, 2009, WPS notified Petitioner by letter that her Medicare billing privileges were revoked effective March 13, 2009 and that she was barred from enrolling in the Medicare program for three years. CMS Ex. 1, at 1. For over two years, Petitioner did not challenge the revocation of her Medicare billing privileges.

By letter dated August 15, 2011, Petitioner requested a hearing before the ALJ to contest the revocation of her Medicare billing privileges. Petitioner alleged that she had been “completely mismanaged by [her] attorney” and that the attorney representing her in the criminal proceedings “made a deal with the District Attorney to end the case due to lack of funds.” P. Req. for Hr’g at 1. CMS moved to dismiss Petitioner’s request for a hearing on the grounds that it was not timely filed. CMS Mot. to Dismiss at 2-3. Petitioner filed a brief opposing dismissal, claiming that the revocation notice from WPS “makes no mention of 42 C.F.R. § 498.40(c),” but that, in any event, she showed “good cause” to extend the filing deadline by asserting “she was of depressed mental state” and “she did not receive good legal help from the lawyer who represented her during the criminal proceeding.” P. Opp. Br. at 2-3.

The ALJ determined that the revocation of Petitioner’s billing privileges was an “initial determination” under the regulations “that conferred hearing rights on Petitioner.” ALJ Decision at 2 (citing 42 C.F.R. § 498.3(b)(17)). The ALJ then stated that “Petitioner was required to request a hearing within 60 days of her receipt of the notice letter . . . to retain her hearing right,” and that an ALJ could “dismiss an untimely hearing request absent a showing of good cause for the untimely request by the party requesting the hearing.” *Id.* (citing 42 C.F.R. §§ 498.40(a)(2), 498.70(c)). The ALJ determined that “Petitioner has offered no proof whatsoever” to support her contention that “she has suffered from psychiatric issues – depression – that impaired her judgment and caused her not to file a timely hearing request.” *Id.* at 3. The ALJ further concluded that CMS’s notice provided a legal basis for Petitioner’s exclusion and “plainly informed [her] of her rights and of her duties.” *Id.* The ALJ then dismissed Petitioner’s hearing request as being untimely filed without a showing of “good cause” to extend the filing deadline. *Id.* at 3-4. Petitioner timely appealed to the Board.

Standard of Review

We review a disputed factual issue as to whether the ALJ's decision is supported by substantial evidence in the record as a whole. We review a disputed issue of law as to 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*, at <http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html>.

Analysis

Petitioner does not dispute that she filed her request for a hearing on August 15, 2011, more than two years after WPS issued its initial determination on July 22, 2009. Instead, Petitioner makes several arguments pertaining to the alleged deficiencies in WPS's notice of revocation of Petitioner's Medicare billing privileges, the requirement to show "good cause" for extending her filing deadline, and the ALJ's failure to address the "length of suspension or the lack of any showing to support the maximum length of suspension . . . imposed by WPS, which raises an issue of fact for a hearing." Petition for Review at 5-9 (emphasis omitted). Petitioner's arguments are not relevant here because, as discussed below, under the regulations WPS's initial determination was binding and Petitioner was not entitled to a hearing before the ALJ.

By stating that Petitioner had to "request a *hearing* within 60 days" of receiving WPS's initial determination, the ALJ misstated the regulatory review procedures in Part 498. ALJ Decision at 2 (emphasis added). By regulation, only reconsidered determinations related to the denial or revocation of billing privileges are eligible for ALJ review. Section 498.5(l) provides in relevant part:

- (1) Any prospective provider, an existing provider, prospective supplier or existing supplier dissatisfied with an initial determination or revised initial determination related to the denial or revocation of Medicare billing privileges may request reconsideration in accordance with § 498.22(a).
- (2) CMS, a CMS contractor, any prospective provider, an existing provider, prospective supplier, or existing supplier dissatisfied with a reconsidered determination under paragraph (l)(1) of this section, or a revised reconsidered determination under § 498.30, is entitled to a hearing before an ALJ.

A party dissatisfied with an initial determination must request *reconsideration of the initial determination* within 60 days of its receipt of that initial determination. Section 498.22(a), (b)(3). If the affected party does not request reconsideration the initial determination is "binding" without further review. Section 498.20(b); *see also* 73 Fed.

Reg. 36,448, 36,451 (2008) (final rule establishing process for appealing the denial or revocation of Medicare billing privileges).²

WPS's notice to Petitioner regarding the revocation of her billing privileges advised Petitioner of the applicable regulatory procedures for review of the initial determination. Specifically, the notice from WPS to Petitioner stated:

If you believe that this determination is not correct, you may request a reconsideration. The reconsideration must be filed in writing within 60 calendar days of the postmark date of this letter.³ The request for reconsideration must state the issues, or the findings of fact with which you disagree and the reasons for disagreement. Failure to file a request timely is deemed a waiver of all rights to further administrative review.

CMS Ex. 1, at 1. Petitioner did not file a request for reconsideration within the 60-day deadline for doing so. Indeed, Petitioner never filed a request for reconsideration by WPS. Nevertheless, Petitioner filed a request for a hearing before an ALJ. By filing a request for a hearing without having first obtained a reconsidered determination, Petitioner did not comply with the procedures set forth in the applicable regulations, which were stated in WPS's revocation notice, and is therefore not entitled to a hearing before an ALJ. *Cf. Hiva Vakil, M.D.*, DAB No. 2460, at 5 (2012) (holding that an affected party was not entitled to an ALJ hearing because his request for reconsideration was untimely filed and the CMS contractor, therefore, did not issue a reconsidered determination). Accordingly, dismissal of Petitioner's request for a hearing was appropriate under section 498.70(b) because, as that subsection provides, she "does not otherwise have the right to a hearing." The ALJ's dismissal of Petitioner's request for a hearing pursuant to section 498.70(c) was not correct because that provision assumes the party requesting the hearing is entitled to a hearing but did not timely file a hearing request. The ALJ's reliance on the wrong subsection, however, is harmless error because both section 498.70(b) and (c) require dismissal of Petitioner's request for a hearing.

The ALJ also determined that there was no good cause to extend the deadline for filing Petitioner's request for a hearing. ALJ Decision at 3. Since Petitioner was not entitled to a hearing before the ALJ regardless of the timing of that request, the issue of whether

² The preamble states in response to a comment that applicants should be able to appeal directly to an ALJ without reconsideration that the "appeals procedure under Part 498 include reconsideration as a level of review before an appeal is made to an ALJ. We believe that the reconsideration level provides an additional opportunity for the matter to be resolved prior to the filing of an appeal to an ALJ." 73 Fed. Reg. at 36,451.

³ The regulations actually require that an affected party's request for reconsideration be filed within 60 days of *receipt* of the initial determination, not the postmark date of the notice, unless the party seeks and receives an extension under section 498.22(d). 42 C.F.R. § 498.22(b)(3). The regulations also provide a five-day presumption of receipt. *Id.* Petitioner does not allege that she did not receive the initial determination in time to file a timely request for reconsideration.

Petitioner showed “good cause” to extend the deadline for filing her request for such a hearing does not arise as a matter of law. Similarly, whether there was an issue of fact for an ALJ hearing, as Petitioner argues, is irrelevant because Petitioner was not entitled to such a hearing in the first instance.

Conclusion

For the foregoing reasons, we affirm the ALJ’s dismissal of Petitioner’s hearing request, but we do so pursuant to 42 C.F.R § 498.70(b) rather than section 498.70(c).

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member