

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

Consolidated Community Resources, Inc.  
Docket No. A-16-15  
Decision No. 2676  
February 10, 2016

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

Consolidated Community Resources, Inc. (CCR), a home health agency participating in the Medicare program, appeals an Administrative Law Judge (ALJ) dismissal of CCR's request for hearing on a January 26, 2015 reconsidered determination of the Centers for Medicare & Medicaid Services (CMS), which revoked CCR's Medicare billing privileges. The ALJ concluded that, by not responding to the ALJ's Order to Show Cause to explain why CCR failed to file its prehearing exchange in compliance with the ALJ's earlier instructions, CCR abandoned its request for hearing and, accordingly, he dismissed CCR's request for hearing. *Consolidated Community Resources, Inc.*, Dismissal, C-15-2054 (August 18, 2015) (Dismissal).

CCR requests review of the Dismissal by the Board. The Board sustains the Dismissal.

**Background**<sup>1</sup>

This case began with an October 17, 2014 initial determination of Palmetto GBA, a CMS Medicare Administrative Contractor, revoking CCR's Medicare billing privileges effective July 15, 2014. Palmetto determined, based on an on-site review on July 15, 2014, that CCR was "no longer operational to furnish Medicare covered items or services and [was] not meeting Medicare enrollment requirements under statute or regulation to supervise treatment of or to provide Medicare covered items or services for Medicare patients." CMS Ex. 1, at 1, citing 42 C.F.R. § 424.535(a)(5). CCR requested reconsideration, stating that it had moved to a new location on June 1, 2014. CMS Ex. 2, at 1. CCR asserted that it has been fully operational at its new location since then and

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<sup>1</sup> The factual information in this section, unless otherwise indicated, is drawn from the Dismissal and the record and is presented to provide a context for the discussion of the issues raised on appeal.

that it had notified Palmetto GBA and the “state of Texas licensing agency” (apparently referring to Texas Department of Aging and Disability Services) of its new location, as purportedly shown in the documents CCR submitted with the reconsideration request. *Id.* at 1-2. By reconsidered determination dated January 26, 2015, CMS upheld the revocation. CMS Ex. 3. CMS stated that it “continues to believe that the [contractor’s] surveyor made the correct determination, because [CCR] failed to update CMS of its new practice location until *after* the provider had been notified of its revocation.” *Id.* at 2 (emphasis in original).

CCR, by counsel, appealed CMS’s reconsidered determination. On May 6, 2015, the ALJ issued an Acknowledgment and Prehearing Order (Prehearing Order) setting out the dates by which the parties must file their briefs, list(s) of any proposed exhibits and witnesses, and copies of the proposed exhibits as part of a prehearing exchange (Prehearing Order at 3), and informing the parties that the ALJ may sanction a noncompliant party (*id.* at 6). CMS’s and CCR’s prehearing exchanges were due, respectively, on June 10, 2015 and July 15, 2015. *Id.* at 3. The Prehearing Order also stated that the parties must file documents electronically, using DAB E-File, unless the ALJ upon written request waives that requirement. *Id.* at 2. The Prehearing Order was sent to CCR by U.S. mail. *Id.* at 7.

On July 24, 2015, the ALJ issued an Order to Show Cause (sent to CCR via counsel by U.S. mail and email courtesy copy) stating that, to date, the ALJ had not received CCR’s prehearing exchange. Order to Show Cause at 1, 2.<sup>2</sup> The ALJ also stated that CCR’s apparent failure to file its prehearing exchange indicated that CCR may have abandoned its request for hearing and that the ALJ may dismiss a request for hearing if the party requesting a hearing abandons the request and fails to respond to an order to show cause why its hearing request should not be dismissed. *Id.* at 1, citing 42 C.F.R. § 498.69(a), (b)(2).<sup>3</sup> The ALJ directed CCR to respond, in writing, no later than August 7, 2015, stating whether it intends to pursue its request for hearing and, if so, explaining why it had not submitted its prehearing exchange. *Id.* at 1-2. The ALJ also

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<sup>2</sup> As the ALJ noted in his Order to Show Cause, page 1, CMS timely filed its prehearing exchange on June 10, 2015.

<sup>3</sup> “The ALJ may dismiss a request for hearing if it is abandoned by the party that requested it.” 42 C.F.R. § 498.69(a). The ALJ “may” consider the request to be abandoned if the party or its representative “[f]ails to respond, within 10 days after the ALJ sends a ‘show cause’ notice, with a showing of good cause.” *Id.* at § 498.69(b)(2).

informed CCR that it must include its prehearing exchange with its response to the Order to Show Cause if it intends to pursue its request for hearing; otherwise, it should submit a written request to withdraw, also by August 7, 2015. *Id.* at 2. CMS, the ALJ said, would have ten days from receipt of CCR's response to the Order to Show Cause to file any reply. *Id.* Finally, the ALJ informed CCR that if it does not timely respond to the Order to Show Cause, he "will" dismiss the case pursuant to 42 C.F.R. § 498.69(a) and (b)(2). *Id.*

On August 18, 2015, the ALJ dismissed CCR's request for hearing on the ground that CCR failed to file a prehearing exchange by the July 15, 2015 deadline set in the Prehearing Order and failed to respond to the ALJ's Order to Show Cause, which, the ALJ concluded, indicated CCR had abandoned its request for hearing. Dismissal at 1. The Dismissal notified CCR of its right to ask the ALJ to vacate the Dismissal pursuant to 42 C.F.R. § 498.72, and to appeal the Dismissal to the Board within 60 days of receipt of the Dismissal in accordance with 42 C.F.R. § 498.80 and 498.82(a). *Id.* at 2. The Dismissal was sent to CCR via counsel by U.S. mail and email courtesy copy. *Id.*

There is no indication that CCR asked the ALJ to vacate the Dismissal. CCR timely appealed the Dismissal to the Board.

### **Standard of Review**

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

"The standard of review for an ALJ's exercise of discretion to dismiss a hearing request where such dismissal is committed by regulation to the discretion of the ALJ is whether the discretion has been abused." *High Tech Home Health, Inc.*, DAB No. 2105, at 7-8 (2007), *aff'd*, *High Tech Home Health, Inc. v. Leavitt*, Civ. No. 07-80940 (S.D. Fla. Aug. 15, 2008).

### **Analysis**

CCR, by counsel, first acknowledges that it failed to file its prehearing exchange in accordance with the ALJ's instructions. Request for review (RR) at 1. As an explanation for why CCR failed to do so, counsel states that he "had a family emergency in July [2015] that required him to travel, resulting in his failure to file the prehearing exchange." *Id.* As for the failure to respond to the ALJ's Order to Show Cause, CCR denies that it abandoned its case, stating that its counsel "was unable to respond to the show cause

order” because “counsel did not receive the Order to show cause until it received the Dismissal Order.” *Id.* CCR says, “Due to staffing issues in counsel’s office, the Order to show cause was not delivered to [counsel] by the front office staff.” *Id.* CCR goes on to say that the Order to Show Cause was “also sent through the counsel’s alternate office email address that was not functioning during the months of June to September [2015].” *Id.* CCR asks the Board to consider its explanation, and “vacate the Dismissal” and “reinstate the appeal,” because CCR did not intentionally disregard the ALJ’s instructions. *Id.* at 2.

For the reasons given below, we sustain the Dismissal.

CCR does not dispute the ALJ’s finding that CCR failed to file its prehearing exchange. Nor does CCR state that it responded to the Order to Show Cause. Instead, CCR simply avers that it did not abandon its request for hearing as the ALJ had determined and offers an explanation for its failure to comply with the Prehearing Order. The relevant standard is not whether CCR’s inaction resulted from intentional disregard but whether the ALJ abused his discretion in dismissing the case based on that inaction.

While CCR offered some explanations to us, CCR does not show why it did not offer the same information to the ALJ when it became aware of the problems. Thus, if CCR’s counsel had a personal matter in or around July 2015 that posed a possibility that CCR would be unable to file its prehearing exchange by July 15, 2015, counsel could have asked the ALJ for additional time to file if he was able to do so before July 15, 2015.<sup>4</sup> If unable to do so before July 15, 2015, counsel could have, and should have, later informed the ALJ why CCR had failed to file its prehearing exchange by July 15, 2015. In fact, there is no indication, or assertion, that CCR made any attempt to communicate with the ALJ’s office at any point after the issuance of the Prehearing Order, which clearly notified CCR what and when it must file and that the failure to do so could subject it to sanctions. Had CCR offered its explanations to the ALJ, the ALJ could have evaluated whether they formed a basis for not subjecting CCR to sanctions for failure to comply with the Prehearing Order. It did not do so and, accordingly, we do not consider the explanations in reviewing the Dismissal. *See Guidelines* (“The Board will not consider issues not raised in the request for review, nor issues which could have been presented to the ALJ but were not.”); *Estes Nursing Facility Civic Ctr.*, DAB No. 2000, at 8 (2005).

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<sup>4</sup> In the Prehearing Order, page 6, which notified the parties that they could be sanctioned for failure to comply with the Order, the ALJ stated, “I will ordinarily not grant an extension of time to either party to file an exchange or other submissions.” However, elsewhere in the Order, page 2, the ALJ informed the parties that if either party wants the ALJ to consider procedural action, such as an extension of time, that party must consult with the opposing party and file a written motion, stating in the motion whether the requested action is opposed or unopposed. Thus, CCR should have known to request any extension in writing and to explain the extraordinary circumstances involved.

CCR's explanation of why it did not respond to the Order to Show Cause amounts to an attempted good case showing that also should have been presented to the ALJ. We understand CCR's assertion that counsel "did not receive the Order to show cause until [he] received the Dismissal Order" due to office staffing problems (RR at 1) to mean that counsel did not personally become aware that the ALJ had ordered CCR to show cause why it did not submit its prehearing exchange until receiving the Dismissal because his office staff did not timely deliver it to him, rather than that the Order was not delivered to counsel's office. Counsel also states that the courtesy copy of the Order to Show Cause was sent to his "alternate office email address that was not functioning during the months of June to September [2015]." *Id.*

Such a good cause statement<sup>5</sup> should first be made before the ALJ for his or her discretionary determination as to any merit. Even if counsel did not know about the Order to Show Cause until the due date for responding to it had passed, CCR could have asked the ALJ to vacate the Dismissal under 42 C.F.R. § 498.72 (stating, in part, that "[a]n ALJ may vacate any dismissal of a request for hearing if a party files a request to that effect within 60 days from receipt of the notice of dismissal and shows good cause for vacating dismissal"). CCR elected not to do so, choosing instead to file an appeal with the Board. Since CCR chose not to give the ALJ an opportunity to consider the merits of its good cause claims, we will not presume that such consideration would have been favorable to CCR.

Before the Board, CCR does not assert abuse of ALJ discretion, and we find none. An ALJ is authorized, by regulation, to dismiss a request for hearing for abandonment. He or she "may" determine the request was abandoned if the appealing party fails to respond within ten days of issuance of an order to show cause, as the ALJ in this case appropriately determined was the case here. 42 C.F.R. § 498.69(a), (b)(2). Moreover, an ALJ has discretionary authority to impose sanctions on a party that fails to adhere to his or her orders, as the ALJ in this case did when he dismissed the request for hearing for failure to respond to his Order to Show Cause. The Board has long held that, on review of an ALJ decision or dismissal, with respect to matters within the ALJ's discretion, the Board does not substitute its judgment for that of the ALJ. *Retail LLC d/b/a Super Buy Rite*, DAB No. 2660, at 9-10 (2015) and cases cited therein.

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<sup>5</sup> The regulations in 42 C.F.R. Part 498 do not define what constitutes "good cause." But the Board has stated that it reviews ALJ determinations concerning good cause, a matter within an ALJ's discretion, to determine whether the ALJ abused his or her discretion. *See, e.g., Kids Med (Delta Medical Branch)*, DAB No. 2471, at 4 (2012).

**Conclusion**

Based on the foregoing reasons, the Board sustains the Dismissal. The Dismissal is binding. 42 C.F.R. § 498.71(b) (“The dismissal of a request for hearing is binding unless it is vacated by the ALJ or the Departmental Appeals Board.”).

\_\_\_\_\_/s/  
Leslie A. Sussan

\_\_\_\_\_/s/  
Constance B. Tobias

\_\_\_\_\_/s/  
Susan S. Yim  
Presiding Board Member