

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Marvin Butterman, M.D.
Docket No. A-18-102
Decision No. 2885
August 3, 2018

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

Marvin Butterman, M.D. (Petitioner) has appealed a May 23, 2018 order, issued by an administrative law judge (ALJ), dismissing his request for hearing. Petitioner requested the hearing to contest the revocation of his Medicare billing privileges by the Centers for Medicare & Medicaid Services (CMS). CMS's stated reason for the revocation was Petitioner's alleged failure to notify the Medicare program of a change in his practice location. CMS initially notified Petitioner of the revocation in November 2015. After Petitioner asked for reconsideration, CMS upheld the revocation in a "reconsidered determination" dated February 4, 2016.

To appeal the revocation further, Petitioner needed to file a request for hearing with the ALJ within 60 days after receiving the reconsidered determination unless he showed "good cause" for filing it later. *See* 42 C.F.R. § 498.40(a)(2), (c). Petitioner filed his hearing request on April 14, 2016. CMS responded with two motions. In the first, CMS asked the ALJ to dismiss the case because the hearing request had been filed more than 60 days after February 9, 2016, the date that Petitioner was legally presumed (absent contrary evidence) to have received the reconsidered determination. *See* CMS' Pre-Hearing Brief and Motion to Dismiss or Motion for Summary Judgment (June 1, 2016) at 9-10. In its second motion, CMS asked the ALJ, alternatively, to uphold the revocation on its merits. *Id.* at 10-13. In response to CMS's motions, Petitioner filed a one-page letter (dated June 10, 2016) that does not mention or allude to the timely filing issue raised by CMS.

Reviewing the record before her, the ALJ found that Petitioner did not file his hearing request within 60 days after receiving the reconsidered determination and had "offered no reason for his late filing, much less suggested any reason approaching good cause." Dismissal at 2. Based on these findings, the ALJ dismissed Petitioner's hearing request

pursuant to 42 C.F.R. § 498.70(c),¹ while noting that Petitioner would not have prevailed even had she denied the dismissal motion and proceeded to decide the case on the merits. *Id.*

The ALJ's May 23, 2018 dismissal order included a statement of "Further Appeal Rights." *Id.* That statement advised Petitioner that he could appeal the order by requesting Board review. *Id.* The statement further advised Petitioner that, "by regulation," his request for review needed to "specify the issues, the findings of fact or conclusions of law with which [he] disagrees and the basis for contending that the findings and conclusions are incorrect." *Id.* (citing 42 C.F.R. § 498.82(b)).

Despite those instructions, which correctly notified Petitioner of what 42 C.F.R. § 498.82(b) requires, his request for review expresses no disagreement with any aspect of the ALJ's dismissal order. Petitioner does not dispute the ALJ's finding that he failed to file his hearing request within 60 days after receiving the reconsidered determination and show good cause for the late filing. Nor does he contend that the ALJ was wrong to dismiss his case for that reason. Furthermore, we see nothing on the face of the ALJ's order that calls into question its legal correctness. Under these circumstances, we conclude that summary affirmance of the dismissal is appropriate. *Integrated Nursing & Health Servs., Inc.*, DAB No. 2816 (2017) (summarily affirming an ALJ's dismissal order about which the appellant expressed no disagreement); *Horace Bledsoe, M.D., et al.*, DAB No. 2753, at 10 (2016) (summarily affirming an ALJ's legal conclusion that the appellant made no "meaningful attempt to challenge"); *Amber Mullins, N.P.*, DAB No. 2729, at 5 (2016) ("Failure to articulate at least some disagreement with the bases for the ALJ decision permits the Board to summarily affirm the ALJ's findings of fact and conclusions of law.").

Because statements in Petitioner's request for review appear to take issue with unspecified Medicare "payment" denials, we note for Petitioner's information – although the information is irrelevant to our decision– that the Board is not empowered to review Medicare payment decisions. *See Vijendra Dave, M.D.*, DAB No. 2672, at 12 (2016). Medicare benefit denials or recoupments may be challenged under a different appeal process, governed by 42 C.F.R. § 405, subpart I. (For more information about the Medicare claims appeal process, please visit <https://www.medicare.gov/claims-and-appeals> and <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/downloads/MedicareAppealsprocess.pdf>.)

¹ Section 498.70(c) permits an administrative law judge to dismiss a case if "[t]he affected party did not file a hearing request timely and the time for filing has not been extended."

Conclusion

For the reasons stated above, the Board affirms the dismissal of Petitioner's request for hearing.

/s/
Christopher S. Randolph

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member