Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Arkady B. Stern, M.D.
Docket No. A-11-93
Decision No. 2417
October 27, 2011

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Arkady B. Stern, M.D. (Dr. Stern) requests review of the May 5, 2011 decision of Administrative Law Judge (ALJ) Steven T. Kessel dismissing Dr. Stern's request for hearing contesting the effective date of his eligibility to participate in the Medicare program. *Arkady Stern, M.D.*, DAB CR2368 (2011). The ALJ dismissed the request pursuant to 42 C.F.R. § 498.70(b), finding that Dr. Stern "forfeited" his right to a hearing by not submitting documents the ALJ required in his Pre-hearing Order. *Id.* at 3.

Dr. Stern initially challenged a determination by the Centers for Medicare & Medicaid Services (CMS), through its contractor, Palmetto GBA (Palmetto), setting an effective date of May 19, 2009 for Dr. Stern's participation in Medicare. The ALJ upheld CMS's determination. *Arkady Stern, M.D.*, DAB CR2078 (2010). Dr. Stern appealed that decision to the Board, and we remanded the case to the ALJ for further record development. *Arkady B. Stern, M.D.*, DAB No. 2329 (2010). The ALJ subsequently remanded the case to CMS for further proceedings. *Arkady B. Stern, M.D.*, DAB CR2246 (2010). CMS subsequently issued a reconsideration decision reaffirming the effective date of May 19, 2009. CMS Decision Letter, January 6, 2011, at 2. Dr. Stern then appealed CMS's reconsideration decision to the ALJ, after which the ALJ dismissed his hearing request. DAB CR2368, at 3-4.

Dr. Stern raises two issues on appeal: (1) whether the ALJ erred in dismissing the request for hearing pursuant to section 498.70(b), and (2) whether the ALJ's remand of this case to CMS was sufficient to implement the Board's decision in DAB No. 2329. As to the first issue, we conclude that the ALJ's determination that section 498.70(b) provided a basis for dismissal was erroneous as a matter of law. As to the second issue, we conclude that the ALJ's remand order did not adequately direct CMS to review the records of both relevant contractors, thereby rendering the review CMS and Palmetto actually conducted inadequate under the Board's decision. Therefore, we remand this case to the ALJ to conduct further proceedings for implementing this decision.

Applicable Legal Standards

Section 1866(j)(8) of the Social Security Act[1] (Act) provides that "[a] provider of services or supplier whose application to enroll (or, if applicable, to renew enrollment) under this title is denied may have a hearing and judicial review of such denial under the procedures that apply under subsection (h)(1)(A) to a provider of services that is dissatisfied with a determination by the Secretary."[2] Part 498 of title 42 in the Code of Federal Regulations implements this statutorily-created right to a hearing and provides, under subpart A, for ALJ review of CMS "initial determinations . . . related to the denial or revocation of Medicare billing privileges. 42 C.F.R. § 498.5(l).

Subpart D of Part 498 establishes the hearing procedures before an ALJ and provides an ALJ the discretion to dismiss a request for hearing on three possible grounds. First, the ALJ may dismiss if the affected party requests a dismissal. Section 498.68(a). Second, the ALJ may dismiss if he or she determines that the party requesting a hearing has abandoned its request. Section 498.69(a). Third, under section 498.70, the ALJ may dismiss "for cause," which that section provides exists under three circumstances, including that the requesting party "is not a proper party or does not otherwise have a right to a hearing." Section 498.70(b).

Standard of Review

The Board reviews a disputed conclusion of law to determine whether it is erroneous. *See 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.

Case Background

This case involves a dispute about the correct effective date for Dr. Stern's participation as a physician in the Medicare program. Based on a Medicare enrollment application Dr. Stern filed on June 18, 2009, CMS, through Palmetto, determined that the effective

[1] The current version of the Social Security Act may be found at http://www.socialsecurity.gov/ OP_Home/ssactlssact.htm. On that website, each section of the Act contains a reference to the corresponding United States Code chapter and section.

[2] Part 498 defines "supplier" as "any of the following entities that have in effect an agreement to participate in Medicare: . . . (5) Physician or other practitioner such as physician assistant . . . ." 42 C.F.R. § 498.2.

date of Dr. Stern's enrollment was May 19, 2009.[3] Dr. Stern alleges that he filed an enrollment application in October 2008 and contends that the effective date should be based instead on that application.

In the first proceeding before the ALJ, Dr. Stern presented sworn declarations from himself and his billing agent, an employee of Advanced Billing Management, testifying that the billing agent submitted an enrollment application for Dr. Stern in October 2008.[4] Dr. Stern and the billing agent also alleged that they each spoke with "Medicare" by phone, and at one point, the billing agent was told that the application process had been delayed due to the transition from a prior contractor to the new contractor, Palmetto. The billing agent further alleged that in a follow-up call in early 2009, a Palmetto employee asserted it could not find the application from Dr. Stern and that he would need to submit a new application. In the initial proceedings, CMS did not deny, or even acknowledge, Dr. Stern's allegations about his dealings with a prior contractor and Palmetto in conjunction with the alleged October 2008 enrollment application.

On February 26, 2010, the ALJ issued a decision based solely on the written record finding that CMS and Palmetto correctly determined the effective date of Dr. Stern's enrollment as May 19, 2009. DAB CR2078, at 3. The ALJ stated that he did not find Dr. Stern's and his billing agent's declarations about the enrollment application to be credible without corroborating documents. *Id.*

Dr. Stern appealed the ALJ's decision to the Board. We found that, as a *pro se* litigant, Dr. Stern may not have understood that he should submit a copy of his alleged October 2008 application or other supporting documents, and that, because CMS never denied

[3] It is undisputed that Dr. Stern also submitted an enrollment application to Palmetto on May 11, 2009 and that Palmetto "returned" that application as being technically deficient and instructed him to submit a new application. Dr. Stern submitted a corrected application on June 18, 2009, from which Palmetto made its determination, pursuant to 42 C.F.R. § 424.521(a)(1), that the effective date of Dr. Stern's enrollment should be thirty days prior to the application date, or May 19, 2009. Under the Board's decision in *Tri-Valley Family Medicine, Inc.*, DAB No. 2358 (2010), the return of the May 11, 2009 application appears to have been unsupported by the regulations and improper. Thus, this case may ultimately present an issue as to whether Palmetto's determination of the effective date of Dr. Stern's enrollment should have, under *Tri-Valley*, been based on the May 11, 2009 application rather than the June 18, 2009 application. *See Tri-Valley* at 9.

[4] In DAB No. 2329, the Board found that "Dr. Stern's Medicare physician billing privileges were deactivated, according to Dr. Stern, in October 2008" and that Dr. Stern "asserted . . . that the deactivation was related to his relocating his office in October 2008." DAB No. 2329, at 2-3. In his appeal of the January 6, 2011 reconsideration decision, Dr. Stern appears to argue, for the first time, that CMS improperly deactivated his billing privileges in 2008. The Board, however, does not have authority to review the October 2008 deactivation of Dr. Stern's supplier billing privileges under the circumstances of this case. *See* 42 C.F.R. §§ 424.545(b), 498.3(b).

receiving a 2008 application from Dr. Stern, Palmetto and the prior contractor could have documents in their files that would corroborate Dr. Stern's allegations. DAB No. 2329, at 5. We remanded the case to the ALJ, directing the ALJ to provide Dr. Stern with an opportunity to present the October 2008 application or other supporting documentation and to require CMS to review its contractors' files to determine whether they had an application from Dr. Stern in October 2008 or other relevant documentation supporting his assertions. *Id.* at 6-7.

The ALJ then further remanded the case to CMS on September 20, 2010, directing CMS to review its records as well as Palmetto's records regarding Dr. Stern's alleged 2008 application. DAB CR2246, at 2. On January 6, 2011, a CMS hearing officer issued a reconsideration decision holding that the effective enrollment date was May 19, 2009. CMS Decision Letter, January 6, 2011, at 2. The hearing officer stated that neither Palmetto's records nor the Provider Enrollment, Chain and Ownership System (PECOS) contained an application from Dr. Stern prior to May 11, 2009. *Id.*

Dr. Stern appealed the reconsideration decision to the ALJ. The ALJ's Pre-hearing Order required Dr. Stern and CMS, among other things, to each "file its exchange of evidence and argument and serve a copy of that exchange on [the opposing party] . . . ." Pre-hearing Order at 2. The filing deadline for CMS was March 21, 2011, while the filing deadline for Dr. Stern was April 25, 2011. On March 16, 2011, CMS filed its proposed exhibits as well as a Motion for Summary Judgment with Incorporated Memorandum of Law and Pre-hearing Brief. Dr. Stern did not file a response to CMS's Motion for Summary Judgment, any proposed exhibits, or a reply brief. On May 5, 2011, the ALJ issued his Decision Dismissing Request for Hearing, relying solely on section 498.70(b) as the basis for dismissing Dr. Stern's appeal. Additionally, the ALJ mentioned in a footnote that Dr. Stern "makes the same contentions now as he did then [in February 2010], and these contentions are unsupported by any documentation." DAB CR2368, at 3 n.1.

Analysis

As discussed in detail below, we conclude that the ALJ erred when, pursuant to section 498.70(b), he held that Dr. Stern no longer had a right to a hearing because Dr. Stern had "forfeited" that right. We also find that the ALJ's remand order to CMS did not fully implement the Board's decision, DAB No. 2329, and consequently, CMS's subsequent

review of its records and the records of Palmetto was not sufficient to meet the requirements of the Board's decision. Therefore, we reverse the dismissal and remand this case to the ALJ for further proceedings as described below.

1. The ALJ erred in concluding that this case could be dismissed under section 498.70(b) on the ground that Dr. Stern "forfeited" his right to a hearing.

In his decision to dismiss Dr. Stern's request for hearing, the ALJ reasoned that, because Dr. Stern had not complied with the Pre-hearing Order, he had "forfeited his right to a hearing." DAB CR2368, at 3. Thus, according to the ALJ, Dr. Stern had "no right to hearing" under section 498.70(b). *Id.* For the following reasons, we conclude that the ALJ erred in determining that section 498.70(b) provided an appropriate ground for dismissal here.

Section 498.70(b) provides that an ALJ may dismiss a request for hearing if "the party requesting the hearing is not a proper party or does not otherwise have a right to a hearing." It is undisputed that Dr. Stern had a statutory right to a hearing under section 1866(j)(8) of the Act, which CMS implemented by adopting section 498.5(l) and amending the definition of "supplier" at section 498.2.[5] *See Victor Alvarez, M.D.*, DAB No. 2325, at 3 (2010) (finding that a supplier enrolled in Medicare has a right to a hearing under section 498.5(l) on the determination of the supplier's date of enrollment); *see also* section 498.3(b)(15) (stating that "[t]he effective date of a Medicare provider agreement or supplier approval" is an initial determination that the affected party may appeal). Neither the ALJ nor CMS have cited any legal authority for the proposition that a party "forfeits" its statutory right to a hearing and, in turn, is subject to dismissal under section 498.70(b) where it does not submit documents pursuant to an ALJ's scheduling order. Moreover, we are unaware of any such authority. Generally, section 498.70(b) applies in situations where a party has no right to a hearing either because it is not the proper person or entity to request review by the ALJ or because the dispute for which it seeks review is

[5] Section 498.5(l) provides in relevant part:

> Appeal rights related to provider enrollment.
>
> (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.

not identified in section 498.5 as a dispute for which a hearing is provided. *See Carmel Convalescent Hospital*, DAB No. 1584, at 26 (1996) (holding that a party whose dispute is identified in section 498.5 cannot lose its hearing right merely because its hearing request fails to dispute the factual allegations on which CMS's determination was based). Therefore, we conclude that, under the circumstances of this case, the ALJ's determination that Dr. Stern "forfeited" his right to a hearing and was subject to dismissal under section 498.70(b) was erroneous as a matter of law.

Here, if the ALJ believed that Dr. Stern's failure to comply with the Pre-hearing Order indicated that Dr. Stern was no longer interested in pursuing his appeal, the ALJ should have proceeded under section 498.69. Section 498.69(b) provides for "[d]ismissal for abandonment" when a party "fails to appear" without good cause and then fails to respond with a showing of good cause to an ALJ's show cause notice. Prior Board decisions support an ALJ's use of abandonment procedures under section 498.69 when a party requesting a hearing fails to file documents the ALJ required. *See, e.g., Osceola Nursing and Rehabilitation Center*, DAB No. 1708 (1999). In *Osceola*, the Board ruled that the abandonment procedures in section 498.69 may be applied in cases where the requesting party "fails to appear" by not filing its arguments or proposed exhibits. *Osceola* at 8. However, when we apply section 498.69 to the record before us, the ALJ's dismissal here does not meet the requirements for abandonment under that regulation because he did not issue a "show cause" notice, as required by subsection (b)(2).[6] *See Kermit Healthcare Center*, DAB No. 1819, at 7 (2002) ("If the regulation requires issuance of an order to show cause where the party's failure is as blatant as failure to appear in person, surely a failure to appear in writing should be inquired after with an order to show cause."). Moreover, Dr. Stern could have reasonably believed that his prior testimony and exhibits, filed in the first proceeding before the ALJ, were sufficient for the ALJ to rule on the merits of his appeal in the subsequent proceeding. This further supports our determination that the ALJ should have used the abandonment procedures and issued a "show cause" notice in an attempt to elucidate the basis for Dr. Stern's failure to file any arguments or exhibits, rather than summarily dismissing the hearing request.

[6] We recognize that the Pre-hearing Order informed the parties that failure to comply with the order could result in "sanctions." Pre-hearing Order at 4. However, such a broadly-worded provision is not sufficient to advise the parties that dismissal would be a possible sanction for not filing the documents the ALJ required.

2. The ALJ's remand instructions to CMS did not fully implement the Board's directions in DAB No. 2329, and CMS's resulting review of Palmetto's records was not in accord with those directions.

From the beginning of this dispute, Dr. Stern alleged that he, through his billing agent, filed an enrollment application in October 2008, when he moved his practice location and CMS deactivated his billing privileges. In the first proceeding before the ALJ and the Board, CMS did not deny Dr. Stern's allegations about the October 2008 application or the substance of his contacts with its contractors. For this and other reasons, the Board remanded this case to the ALJ to determine whether CMS, its contractors, or Dr. Stern had evidence that would corroborate Dr. Stern's testimony and whether the evidence would provide a basis for an effective date earlier than May 19, 2009. The Board directed the ALJ to require CMS –

> (1) to address Dr. Stern's assertions about the alleged October 2008 application; (2) to produce information from Palmetto's *or the prior contractor's* file about Dr. Stern's alleged October 2008 application; and (3) to consider whether the regulations and policies governing the reactivation of billing privileges in effect as of October 2008 provide a basis for approving an effective date earlier than May 19, 2009.

DAB No. 2329, at 6-7 (emphasis added).

In his subsequent remand of the case to CMS, however, the ALJ did not instruct CMS to review the records of the prior contractor. Rather, the ALJ simply directed "CMS or *its contractor* . . . [to] search their records to determine whether documents pertaining to an October 2008 enrollment application exist." DAB CR2246, at 2 (emphasis added). The failure to direct a search of the prior contractor's records is material because it is the prior CMS contractor, rather than Palmetto, who would have received the alleged October 2008 application from Dr. Stern and may not have transferred that application to Palmetto. Therefore, the ALJ's remand order of September 20, 2010 was deficient because it did not require a review of the prior contractor's records as well as Palmetto's records.

Moreover, CMS's review did not comply even with the ALJ's directions. The language used in the hearing officer's reconsideration decision was merely conclusory and, contrary to the ALJ's remand order, was unsupported by any description of the procedures used to check for an October 2008 application. Indeed, the hearing officer's statement in the reconsideration decision that "Palmetto GBA has no record in their internal system of receiving an application prior to May 19, 2009" is not supported by any evidence in the record before us. *See* CMS Decision Letter, January 6, 2011, at 2.

For example, the hearing officer did not explain the nature of the records Palmetto keeps in its internal system and the search methods used to examine those records, nor did CMS submit any documentation about the nature and results of the search to the ALJ. In any event, a hearing officer's decision does not constitute "evidence" in this proceeding. Similarly, CMS did not submit any sworn testimony from an individual or individuals who conducted the records search regarding the results of that effort. Moreover, Dr. Stern and his billing agent maintained that there were also phone calls between them and the prior contractor and Palmetto in 2008 and early 2009 about the status of Dr. Stern's enrollment application. It is unclear from the hearing officer's reconsideration decision whether Palmetto maintains any phone records associated with supplier enrollment application inquiries and whether anyone searched such records if they do exist. This omission is material because it could possibly corroborate, or undercut, the testimony of Dr. Stern and/or his billing agent.

For the preceding reasons, we remand this case to the ALJ to require CMS to present *to him* the results of the review of its and the contractors' records. Before the ALJ, CMS and the two contractors should be clear about what records are maintained pertaining to enrollment application files and phone inquiries about such applications, explaining the manner in which the records are maintained and the methods used to search for the application Dr. Stern allegedly submitted and phone contacts in the records. Specifically, CMS, Palmetto, and the prior contractor should review all of their relevant records for the existence of an application or any other submission by Dr. Stern related to his supplier enrollment prior to January 1, 2009. This review should include any phone records between October 1, 2008 and March 31, 2009 documenting communication between these entities and Dr. Stern and/or Advanced Billing Management. Regardless of whether such records are found, the appropriate personnel of each entity should document all of the methods employed to locate any application, or other submission by Dr. Stern, or phone conversations prior to March 31, 2009. CMS should submit all of the search results and evidence detailing the search methods to the ALJ in the remand proceedings. Absent any evidence from CMS that the two contractors could not locate the relevant information, there is no basis for the ALJ to conclude that the testimony proffered by Dr. Stern and the billing agent is not credible under the facts and history of this case. Moreover, regardless of whether CMS's further search corroborates or undercuts Dr. Stern's assertion about the October 2008 application, Dr. Stern is entitled to a hearing on the issue because the testimony he proffered arguably creates a genuine dispute of material fact. While Dr. Stern's failure to produce a copy of such an application may impact the credibility of the testimony, it is not conclusive. We cannot conclude that no rational trier of fact could find the testimony credible, particularly in light of the timing of the alleged submission relative to the change in CMS contractors.

Conclusion

For all of the forgoing reasons, we conclude that: (1) the ALJ erred in concluding that Dr. Stern "forfeited" his right to a hearing by not following the directions of the Pre-hearing Order and was therefore subject to dismissal under section 498.70(b); and (2) that the ALJ's remand order and CMS's subsequent review of its and Palmetto's records were not sufficient to implement our decision in DAB No. 2329. Therefore, we remand this case to the ALJ for proceedings consistent with this decision.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Stephen M. Godek
Presiding Board Member