Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Vanguard Vascular & Vein, PLLC,
Trent E. Proffitt, M.D., and
Franklin S. Yau, M.D.
Docket No. A-13-51
Decision No. 2523
July 3, 2013

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Vanguard Vascular & Vein, PLLC; Trent E. Proffitt, M.D.; and Franklin S. Yau, M.D. (Petitioners), appeal a February 13, 2013 decision by an Administrative Law Judge (ALJ). *Vanguard Vascular & Vein, PLLC*, ALJ Ruling No. 2013-3 (2013) (ALJ Decision). In that decision, the ALJ granted the motion by the Centers for Medicare & Medicaid Services (CMS) to dismiss Petitioners' request for a hearing to challenge the effective date of their enrollment as suppliers in the Medicare program. The ALJ determined that Petitioners' request was untimely under 42 C.F.R. § 498.40(a)(2) and that Petitioners had not established good cause to extend the time for filing.

As explained below, we affirm the ALJ Decision.

Applicable Law

A determination of the effective date of a supplier's enrollment in the Medicare program is an "initial determination" that is subject to the review procedures set forth in 42 C.F.R. Part 498. 42 C.F.R. §§ 498.3(a)(1), (b)(15). Under those procedures, a prospective or existing supplier dissatisfied with an initial determination may request reconsideration of that determination. *See id.* § 498.5(l)(1). If the supplier also is dissatisfied with the reconsidered determination, it may request a hearing before an ALJ. *Id.* § 498.5(l)(2). Unless shown otherwise, the supplier is presumed to have received the notice of reconsidered determination five days after the date on the notice. *Id.* §§ 498.50(a)(2); 498.22(b)(3).

The supplier must file a request for hearing within 60 days from its receipt of the notice of reconsidered determination, unless the supplier files a request for extension of time "stating the reasons why the [hearing] request was not filed timely" and the ALJ

determines that the supplier has shown good cause for granting an extension. *Id.* § 498.40(a)(2), (c). On his or her own motion or the motion of a party, an ALJ may dismiss a hearing request if it was not timely filed and the time for filing has not been extended. *Id.* § 498.70(c).

Case Background[1]

In December 2011, Drs. Proffitt and Yau, who were enrolled as suppliers in the Medicare program, applied to enroll their newly established group practice, Vanguard Vascular & Vein, and to reassign their benefits to that practice. An enrollment application was submitted for each Petitioner. In March 2012, TrailBlazer Health Enterprises, LLC (TrailBlazer), a contractor acting on behalf of CMS, approved all three of Petitioners' enrollment applications and assigned Petitioners an effective enrollment date of November 9, 2011. Petitioners requested reconsideration of the effective date. On May 16, 2012, TrailBlazer issued an unfavorable reconsidered determination upholding the effective date.

In a request for hearing dated September 11, 2012, Petitioners sought to challenge TrailBlazer's reconsidered determination. CMS moved to dismiss the hearing request, arguing that it was filed 53 days after the regulatory deadline for doing so. In response, Petitioners acknowledged the delay but argued that good cause existed for extending the filing deadline because they had been misinformed about the applicable deadline by TrailBlazer personnel and a CMS brochure.

The ALJ granted CMS's motion to dismiss, concluding that Petitioners had not shown good cause to extend the time to file their hearing request. Petitioners timely appealed the ALJ Decision to the Board.

Standard of Review

Our standard of review on a disputed issue of fact is whether the ALJ's decision is supported by substantial evidence in the record as a whole. Our standard of review on a disputed issue of law is whether the ALJ's decision is erroneous. 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. Our standard of review on an ALJ's exercise of discretion in determining whether there is "good cause" to extend the filing time is whether the ALJ abused his or her discretion. *Hillcrest Healthcare, L.L.C.*, DAB No. 1879, at 5 (2003).

[1] Background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for his findings.

Analysis

On appeal, Petitioners reprise their argument that TrailBlazer personnel and the CMS brochure misinformed them about the deadline for filing a hearing request. They allege that after they received TrailBlazer's initial determination, they called TrailBlazer's "Provider Enrollment hotline" to inquire about their appeal rights. According to Petitioners, TrailBlazer personnel "guided" them to "information indicating" they had 120 days to file a request for reconsideration and, if necessary, 180 days to file a request for hearing before an ALJ, as well as to a brochure "citing the same 120-day and 180-day deadlines." Request for Review (RR) at 2nd p. (unnumbered). Petitioners contend the ALJ should have determined that this misinformation provided good cause for extending the time to file a hearing request.

The Board "has never attempted to provide an authoritative or complete definition of the term 'good cause' in 42 C.F.R. § 498.40(c)(2)." *Brookside Rehab. & Care Ctr.*, DAB No. 2094, at 7 n.7 (2007); *Wesley Long Nursing Ctr., Inc.*, DAB No. 1937, at 9 n.7 (2004); *Hillcrest Healthare, L.L.C.*, DAB No. 1879, at 5. Here, we need not decide the scope of an ALJ's discretion under that section because, under any reasonable definition of that term, the ALJ did not abuse his discretion by determining that Petitioners failed to establish good cause for extending the filing deadline. The Board has recognized that receiving incorrect or misleading information about one's appeal rights might constitute good cause to extend the filing deadline in certain circumstances. *See*, *e.g.*, *Waterfront Terrace, Inc.*, DAB No. 2320, at 6, 8 (2010) (upholding ALJ's finding that no good cause existed to justify extension of filing deadline where notice letter reasonably informed appellant of its appeal rights); *Wesley Long*, DAB No. 1937, at 9 (explaining that since appellant was never notified of its right to a hearing, the deadline for filing a hearing request was tolled "regardless of whether [appellant] was misled by the absence of such notice," so there was no need to reach good-cause issue). Here, however, as we discuss below, TrailBlazer's reconsidered determination contained clear, correct information about the operative filing deadline and Petitioners failed to show that they relied on other information about the deadline or that, if they did, their reliance was reasonable. Accordingly, we affirm the ALJ Decision.

1. TrailBlazer's reconsidered determination clearly informed Petitioners they had 60 days to request a hearing.

Petitioners' argument rests entirely on misinformation they claim to have received from TrailBlazer personnel and from a CMS brochure after TrailBlazer issued its initial determination. However, as the ALJ noted, TrailBlazer subsequently issued a reconsidered determination that correctly explained – in "unambiguous and conspicuous language" – that Petitioners had 60 days from their receipt of the reconsidered determination to request a hearing before an ALJ. ALJ Decision at 5. The reconsidered determination provides:

> FURTHER APPEAL RIGHTS: ADMINISTRATIVE LAW JUDGE (ALJ)
> If you are satisfied with this decision, you do not need to take further action. If you believe that this determination is not correct, you may request a final ALJ review. You must act quickly and must meet the requirements for requesting a final ALJ review. **The appeal must be filed within 60 calendar days after the date of receipt of this decision** . . . .

CMS Exs. 1, 2, 3, at 3 (emphasis added).

Petitioners do not address the ALJ's finding that TrailBlazer's reconsidered determination contained correct information about the operative filing deadline, let alone explain why they allegedly disregarded that information and instead relied on the information and brochure to which TrailBlazer personnel previously had "guided" them. We agree with the ALJ that it was "unreasonable for Petitioners not to follow the clear instructions included in the determination they sought to appeal." ALJ Decision at 5.

We also agree with the ALJ that, "[a]t a minimum, any discrepancy between the brochure and the language of the reconsidered determination should have made Petitioners aware that one of the documents was incorrect." *Id.* In addition to providing the directions quoted above, the reconsidered determination notes that "[a]ppeal rights can be found at 42 CFR 498, 424.520 or 424.521 of the Medicare regulations" and provides a customer service phone number for enrollment-related questions. CMS Exs. 1, 2, 3, at 4. Yet, Petitioners apparently did not avail themselves of these resources to verify the deadline. Their failure to do so further undercuts their contention that the ALJ should have found good cause to extend the time to file their hearing request.

2. Petitioners should have realized the CMS brochure did not apply to their appeal, so any reliance on it was unreasonable.

Despite the clear statement in the reconsidered determination about the 60-day deadline to file a hearing request, Petitioners claim they reasonably believed the operative deadline was 180 days based on misinformation they received from TrailBlazer personnel and the CMS brochure. They concede the brochure applies to appeals regarding claims for reimbursement for services and supplies provided to Medicare beneficiaries, not provider and supplier enrollment appeals. But they appear to assert they were nonetheless reasonable in relying on the brochure because TrailBlazer personnel referred them to it. RR at 2nd p. (unnumbered).

The fact that TrailBlazer personnel may have referred Petitioners to the brochure does not mean Petitioners could automatically conclude the brochure applied to Trailblazer's enrollment determinations, regardless of its content. We agree with the ALJ that "based on [the brochure's] content," Petitioners "should have reasonably known" it did not apply to their appeals. ALJ Decision at 4. The brochure is titled "The Medicare Appeals

Process: Five Levels to Protect Providers, Physicians, and Other Suppliers." Petitioners (P.) Ex. 3, at 2. As the ALJ noted, the brochure "never refers to provider or supplier enrollment or appeals of enrollment decisions such as the effective date of Medicare enrollment." ALJ Decision at 4, citing P. Ex. 3, at 2. Instead, the brochure "repeatedly uses terms such as 'Medicare claims' and 'claim determinations.'" *Id.* The brochure also provides that an appellant must include information in its appeal requests, such as beneficiary name, beneficiary Medicare Health Insurance Claim (HIC) number, specific service and/or item, and specific date of service, that would not be needed for or be relevant to a provider or supplier's appeal of the effective date of its enrollment in the Medicare program. *See* P. Ex. 3, at 2. Thus, Petitioners could not reasonably think the brochure applied to their appeals.

Petitioners' alleged reliance on the brochure <u>as providing a 180-day deadline to file a hearing request</u> is particularly unreasonable. The brochure explains that there are five levels of review in the appeals process: (1) redetermination by a fiscal intermediary, carrier, or Medicare Administrative Contractor; (2) reconsideration by a Qualified Independent Contractor (QIC); (3) hearing by an ALJ; (4) review by the Medicare Appeals Council within the Departmental Appeals Board; and (5) judicial review in U.S. District Court. P. Ex. 3, at 2. The brochure provides that an appellant has 120 days to seek redetermination, 180 days to seek reconsideration, and 60 days to request an ALJ hearing. *Id.* Thus, in order for the operative filing deadline to have been 180 days rather than 60, Petitioners needed to be seeking reconsideration by a QIC after receiving a redetermination. Yet, as the ALJ observed, Petitioners never requested or received a "redetermination," and they had no contact with a QIC. ALJ Decision at 4. Petitioners could not reasonably conclude based on this information that the 180-day reconsideration deadline applied.

3. <u>Petitioners failed to show they relied on the brochure.</u>

In concluding that Petitioners had not shown good cause to extend the filing deadline, the ALJ also reasoned that it was "unlikely Petitioners actually relied on the CMS brochure." ALJ Decision at 5. Petitioners challenge the ALJ's conclusion and point to an affidavit from one of their employees as support for their assertion of reliance. RR at 2nd p. (unnumbered), citing P. Ex. 1. In the affidavit, the employee says that, "[t]o [his] knowledge," Petitioners "relied on the information received from Trailblazer in filing their request for hearing" and "this good-faith reliance was the reason" Petitioners' request for hearing was filed beyond the 60-day deadline. P. Ex. 1, at 2 (¶ 6).

The affidavit is not persuasive evidence that Petitioners relied on the brochure. The employee's statements are speculative and unsupported. Moreover, as the ALJ concluded, the content of Petitioners' hearing request suggests they did not rely on the CMS brochure and instead knew the appropriate filing deadline from TrailBlazer's reconsidered determination.

In their hearing request, Petitioners stated they "respectfully request a hearing under 42 CFR §§ 498 and 424 for the purpose of reconsideration for the effective enrollment date of the three PTAN's [Provider Transaction Access Numbers] listed below." Request for Hearing at 1st p. (unnumbered). As the ALJ noted, sections 498 and 424 are not referenced in the CMS brochure, but are referenced in the reconsidered determination. ALJ Decision at 5, citing P. Ex. 3, at 2, and CMS Ex. 1, at 4. In addition, Petitioners specifically requested a "hearing," but the brochure provides that an ALJ hearing is the "third level of appeal" (as opposed to the second level of appeal after a reconsidered determination) and must be requested "within 60 days of receipt of the reconsideration." *Id.*, citing P. Ex. 3, at 2. In other words, the brochure provides the same filing deadline for requesting an ALJ hearing – 60 days from receipt – as a request for an ALJ hearing under section 498. *See* 42 C.F.R. § 498.40(a)(2). Thus, as discussed above, for the operative filing deadline to have been 180 days rather than 60, Petitioners needed to be seeking reconsideration by a QIC after receiving a redetermination. Yet, as the ALJ observed, Petitioners failed to include in their request any of the items, such as a beneficiary name or HIC number, that the brochure says an appellant must provide when requesting reconsideration. ALJ Decision at 5, citing P. Ex. 3, at 2.

Petitioners did include in their request much of the information – legal business name, Medicare PTANs, and tax identification numbers – that TrailBlazer's reconsidered determination states is required in a request for ALJ review, and they addressed the request in the manner specified in that determination. *See* Request for Hearing at 1st p. (unnumbered); CMS Exs. 1, 2, 3, at 3. The directions in the reconsidered determination with which Petitioners' hearing request complied immediately follow the statement in the determination that Petitioners had 60 days from the date they received the determination to file a hearing request. *See* CMS Exs. 1, 2, 3, at 3.

Thus, as the ALJ determined, the content of Petitioners' request suggests they were aware of the operative deadline from the reconsidered determination and did not rely on the brochure. ALJ Decision at 5. Petitioners nevertheless assert that they "relied on the CMS Brochure for its stated [180]-day deadline, not the substance of the appeal," and argue that this alleged limited reliance was "reasonable, given the statements of CMS's own agents." RR at 2nd p. (unnumbered). However, Petitioners do not explain why it would be reasonable to conclude that all of the directions in the reconsidered determination for filing a hearing request would apply except the filing deadline.

Conclusion

For the reasons discussed above, we conclude the ALJ did not abuse his discretion in determining that Petitioners failed to establish good cause for extending the deadline to file a hearing request. Accordingly, we affirm the ALJ's dismissal of Petitioners' hearing request as untimely filed.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member