

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Laredo Laser and Surgery, Ltd.,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-717

Decision No. CR2153

Date: June 11, 2010

DECISION DISMISSING APPEAL FOR CAUSE

For the reasons set forth below, I deny Petitioner's request for an extension of time to file a request for hearing before an Administrative Law Judge (ALJ). I find that Petitioner failed to file a timely request for a hearing or establish good cause to extend the time for such filing. 42 C.F.R. § 498.40(c). I therefore dismiss this case pursuant to 42 C.F.R. § 498.70(c). Petitioner does not have a right to an ALJ hearing to review the Medicare contractor's December 16, 2009, reconsideration decision.

I. Background

Petitioner, Laredo Laser and Surgery, Ltd., was granted participation as a supplier in the Medicare program effective February 18, 2009. Petitioner sought to change its effective date from February 18, 2009 to October 17, 2008, and requested reconsideration by the Medicare contractor. By letter dated December 16, 2009, the contractor affirmed the previous determination finding the supplier's effective date remained February 18, 2009. The contractor's December 16, 2009 reconsideration decision explained that the request for hearing must be filed no later than 60 days from the date of receipt of the decision. 42 C.F.R. § 498.40(a).

If a request for hearing is not filed within 60 days, the affected party may request an extension of time to file. 42 C.F.R. § 498.40(c)(1). If good cause is shown, the ALJ may extend the time for filing the request for hearing. 42 C.F.R. § 498.40(c)(2). If, however, the ALJ determines that good cause is not established, the ALJ may, upon his or her own motion, dismiss the untimely request for hearing for cause. 42 C.F.R. § 498.70(c).

As examined more fully below, Petitioner did not file a request for an ALJ hearing within the prescribed 60 days. Instead, on May 13, 2010, Petitioner filed a request (P. Request) for an extension of time to file a request for an ALJ hearing under 42 C.F.R. § 498.40(c)(1). On May 21, 2010, I issued an Order to Show Cause (Order) why I should not dismiss the case. In the Order, I offered Petitioner an opportunity to demonstrate good cause for extending the time for filing. On June 1, 2010, Petitioner responded to my Order (P. Resp.) and provided its explanation as to why the request was delayed.

II. Issues

1. Whether Petitioner filed a timely request for hearing in accordance with 42 C.F.R. § 498.40(a); and, if not,
2. Whether Petitioner has demonstrated good cause for extending the time to file a request for hearing under 42 C.F.R. § 498.40(c)(2).

III. Findings of fact and conclusions of law, and supporting discussion

I make conclusions of law to support my decision in this case. I set forth each conclusion below as a separate heading.

A. Petitioner did not submit a request for an ALJ hearing within 60 days of receipt of the December 16, 2009 reconsideration decision and therefore failed to timely file in accordance with 42 C.F.R. § 498.40(a).

Petitioner's right to a hearing is governed by the provisions of 42 C.F.R. Part 498. Section 498.40(a)(2) of 42 C.F.R. expressly provides that:

[an] affected party or its legal representative or other authorized official must file the request [for hearing] 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.

The contractor issued its reconsideration decision on December 16, 2009.¹ Therefore, Petitioner was required to file any request for hearing no later than February 19, 2010. 42 C.F.R. § 498.40(a)(2).

Petitioner has not filed a request for hearing. Furthermore, Petitioner did not file even the extension request until May 13, 2010, 83 days after the time for filing a hearing request expired. P. Request.

Therefore, I conclude that Petitioner did not submit a timely request for hearing.

B. Petitioner has not demonstrated good cause to extend the time for filing provided by 42 C.F.R. § 498.40(c)(2).

As discussed, Petitioner filed a request for an extension of time to file its request for hearing pursuant to 42 C.F.R. § 498.40(c)(1). P. Request.

To extend the period for filing, the “affected party or its legal representative . . . may file with the ALJ a written request for extension of time stating the reasons why the request was not filed timely.” 42 C.F.R. § 498.40(c)(1). I may extend the time for filing the request “for good cause shown.” 42 C.F.R. § 498.40(c)(2). A definition of “good cause” does not exist in the applicable regulations, and the “Board has never attempted to provide an authoritative or complete definition of the term ‘good cause’ in section 498.40(c)(2).” *Hillcrest Healthcare, L.L.C.*, DAB No. 1879, at 5 (2003).

In its request, Petitioner indicated that it only recently retained counsel in this matter. P. Request. Petitioner further stated that it sought the extension “in the interest of justice and fairness.” *Id.*

As I noted in my Order, belated retention of counsel is not sufficient to demonstrate good cause for such an untimely appeal. In response to my Order, Petitioner asserted that it inadvertently submitted its only copy of related documents to the Medicare contractor with its request for reconsideration. P. Resp. at 1. Petitioner was unable to retrieve the originally filed documents from the contractor. *Id.* at 2.

Petitioner asserts that “it took 90 days to duplicate the original filing so that it could be referred to counsel for their opinion.” *Id.*

¹ The date of receipt is presumed to be five days after the date on the notice, unless a showing exists that it was, in fact, received earlier or later. 42 C.F.R. §§ 498.40(a)(2), 498.22(b)(3). Petitioner does not contend that the decision was received at a later date. In fact, Petitioner submits evidence that, as of January 2, 2010, Petitioner had knowledge of the reconsideration decision and began preparing to request an ALJ hearing on the matter. *See* Petitioner Exhibit 1.

While I do not find a single comprehensive definition of what constitutes good cause, it is clear to me that Petitioner's failure to retain copies of documents they submitted to the contractor, its lengthy effort to duplicate that package, and its delay in obtaining counsel can not be considered, individually or collectively, good cause for a delay of almost three months after the due date under any reasonable meaning of "good cause." Furthermore, Petitioner has not explained why it could not have requested an extension before the time for filing a hearing request expired and explained then why it needed additional time to prepare its submission instead of waiting until long after the expiration of that period to seek an extension.

I conclude that Petitioner has not demonstrated good cause to grant the request to extend the time for filing.

III. Conclusion

Petitioner did not timely file a request for hearing, and I do not find good cause to justify extending the time for filing. I therefore, on my own motion, dismiss this case for cause. 42 C.F.R. § 498.70(c).

/s/
Leslie A. Sussan
Board Member