

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Arwinnah P. Bautista, M.D.,

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-781

Decision No. CR2185

Date: July 16, 2010

DECISION DISMISSING APPEAL FOR CAUSE

For the reasons set forth below, I find that Petitioner, Arwinnah P. Bautista, M.D., 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). Petitioner therefore does not have a right to an Administrative Law Judge (ALJ) hearing to review the Medicare contractor's March 10, 2010 reconsideration decision. I therefore dismiss this case pursuant to 42 C.F.R. § 498.70(c).

I. Background

Petitioner was granted participation as a provider in the Medicare program effective September 20, 2009. Petitioner sought to change his effective date from September 20, 2009 to May 1, 2009, and requested reconsideration by the Medicare contractor. By letter dated March 10, 2010, the contractor stated that “[p]hysician and non-physician practitioners cannot appeal the effective date decision made by the contractor.” Thus, the effective date remained September 20, 2009. The contractor's March 10, 2010 reconsideration decision letter explained that appeal rights can be found at 42 C.F.R. 498.

By letter dated April 15, 2010, Petitioner filed a request for hearing before an Administrative Law Judge (ALJ) again requesting a change in the effective date of his participation in the Medicare program. However, according to the envelope in which the hearing request letter arrived, the actual mailing date of the request for hearing is June 12, 2010, almost two months after the date typed on the letter itself.

Per 42 C.F.R. § 498.40(a)(2), Petitioner “must file the request [for hearing] in writing within 60 days from receipt of the notice of initial, reconsidered, or revised determination.”

Pursuant to 42 C.F.R. § 498.40(c), if the request for hearing was not filed within 60 days, the affected party must show good cause as to why I should extend the time for filing a request for hearing. Accordingly, by Order to Show Cause dated July 1, 2010, I directed Petitioner to show cause why this case should not be dismissed as untimely.

Petitioner’s representative responded by letter dated July 6, 2010.

II. Issue

The issue in this case is whether, pursuant to 42 C.F.R. § 498.40(c), Petitioner has shown good cause for me to extend the time for filing his request for hearing beyond 60 days and thus not dismiss the case as untimely under 42 C.F.R. § 498.70(c).

III. Findings of Fact, Conclusions of Law, and Supporting Discussion

My findings of fact and conclusions of law are set out as separate headings followed by supporting discussion.

A. Petitioner’s hearing request is untimely.

The number of days between the date of the reconsideration decision (March 10, 2010) and the date of mailing the request for hearing (June 12, 2010) is 94 days. The hearing request was required to be filed within 60 days of receipt of the reconsideration decision under the authorities cited above. Section 498.22(b)(3) provides that the “date of receipt will be presumed to be 5 days after the date on the notice unless there is a showing that it was, in fact, received earlier or later.” Petitioner has not alleged a later date of receipt of the reconsideration decision or an earlier date of mailing of its hearing request.

It follows that Petitioner’s hearing request was filed 29 days late. Petitioner does not deny that the request was untimely, and I find it undeniable on this record.

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

As discussed, Petitioner's representative responded to my Order to Show Cause, stating reasons why the hearing request was not timely filed. Petitioner's representative offers the following reasons why the hearing request was untimely:

- (1) Upon review of Subpart A of 42 C.F.R. 498, Petitioner "did not find reference to a response time within that text;"
- (2) Petitioner felt that "the verbiage in the title of Subpart B did not seem to apply," but admits that, after receipt of the Order to Show Cause, it was evident that section 498.22 "does indicate response time guidelines;" and
- (3) Petitioner "erroneously assumed that an appeal could be filed at any time" and "[w]ith that in mind . . . put the appeal in a queue to be submitted in order of the projects . . . in process at that time, rather than expedite it."

Petitioner's letter dated July 6, 2010, at 1-2. Petitioner's representative summarizes that "[s]imply put, a layman's interpretation of 42 CFR 498 caused our delayed request." *Id.*

"For good cause shown, the ALJ may extend the time for filing the request for hearing." 42 C.F.R. 498.40(c)(2). A definition of "good cause" does not exist in the applicable regulations, and the "[Departmental Appeals] Board [(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).

While the Board has never precisely defined the term "good cause," it is clear to me that a simple decision to not expedite filing of a request for hearing cannot be a basis for a good cause determination. I find the assumption that an appeal could be submitted "at any time" unreasonable. Furthermore, the correct regulatory provision setting the deadline to request an ALJ hearing on a contractor's reconsideration determination is not section 498.22 (which sets procedures for seeking reconsideration by a contractor of an initial determination of denial or revocation) but rather section 498.40(a)(2), quoted above. Section 498.40, entitled "Hearings," is in subpart D. Petitioner's explanations as to why he did not know the applicable deadline are not persuasive, because Petitioner could have learned the deadline by: (1) reading 42 C.F.R. Part 498 in its entirety; (2) calling the MAC Support Line telephone number listed in the reconsideration decision letter during the hours specified in the letter; and/or (3) calling the Centers for Medicare & Medicaid Services, the Civil Remedies Division, or the Board.

I conclude that Petitioner has not demonstrated good cause to grant an extension of time for filing his request for hearing.

IV. 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