

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

LCD Complaint: Bioengineered Skin Substitutes
for the Treatment of Diabetic and Venous Stasis Ulcers
of the Lower Extremities
(LCD L34285)
Docket No. A-17-78
Decision No. 2814
September 1, 2017

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

A Medicare beneficiary, to whom we refer as the Aggrieved Party, challenged a Medicare coverage policy, issued by the Medicare contractor in his geographic location, pursuant to 42 C.F.R. Part 426, which authorizes the Departmental Appeals Board (Board) and its administrative law judges (ALJs) to review the “validity” of “local coverage determinations” (LCDs) issued by Medicare contractors. The Aggrieved Party here seeks review of the decision of an ALJ dismissing his complaint. *In re LCD Complaint: Bioengineered Skin Substitutes for the Treatment of Diabetic and Venous Stasis Ulcers of the Lower Extremities*, DAB CR4832 (2017). For the reasons set out below, we affirm the ALJ’s dismissal of the complaint.

Legal Background

The applicable regulations provide in pertinent part that, to be considered timely, an LCD complaint must be filed with the office designated by the Centers for Medicare & Medicaid Services (CMS) within “6 months of the issuance of a written statement from each aggrieved party’s treating practitioner, in the case of aggrieved parties who choose to file an LCD challenge before receiving the service.” 42 C.F.R. § 426.400(b). As pertinent here, a complaint must include a “copy of a written statement from the treating physician that the beneficiary needs the service that is the subject of the LCD.” *Id.* § 426.400(c)(3). The regulations further provide that the “ALJ assigned to the LCD review determines if the complaint is acceptable by confirming . . . [that] (2) the complaint meets the requirements for a valid complaint in 426.400” *Id.* § 426.410(b). Section 426.410(c) provides:

Unacceptable complaint. (1) If the ALJ determines that the complaint is unacceptable, the ALJ must provide the aggrieved party (or parties) one opportunity to amend the unacceptable complaint.

(2) If the aggrieved party (or parties) fail(s) to submit an acceptable amended complaint within a reasonable timeframe as determined by the ALJ, the ALJ must issue a decision dismissing an unacceptable complaint.

(3) If a complaint is determined unacceptable after one amendment, the beneficiary is precluded from filing again for 6 months after being informed that it is unacceptable.

Case Background

On March 20, 2017, the Aggrieved Party filed a submission via DAB E-File, the Departmental Appeals Board's (DAB's) electronic filing system, challenging the LCD identified above. As relevant here, the Aggrieved Party included in his submission a written statement from his physician (Attachment 1 of complaint). On March 22, 2017, the ALJ issued an "Acknowledgment of Receipt and Order to Aggrieved Party to Amend Unacceptable Complaint" (3/22/17 ALJ Order). In that document, the ALJ stated that she had determined that the "Complaint from the Aggrieved Party does not constitute an acceptable valid LCD complaint as set forth in 42 C.F.R. § 426.400." 3/22/17 ALJ Order at 2. The ALJ explained her determination as follows:

As previously stated, an aggrieved party must file the complaint within six months of the date of the treating physician's statement in order for the complaint to be timely and acceptable. 42 C.F.R. § 426.400(b)(1). Because the Aggrieved Party's physician's statement is not dated, I am unable to determine that the Aggrieved Party filed a timely complaint.

Id. at 3. The ALJ continued:

Therefore, the Aggrieved Party has one opportunity to amend his complaint pursuant to the relevant regulation, 42 C.F.R. § 426.410(c)(1). If he does not submit an acceptable amended complaint, then I must issue a decision dismissing the unacceptable complaint. 42 C.F.R. § 426.410(c)(2). The Aggrieved Party must submit a valid amended complaint, via the DAB E-File system, **within 30 days of the date of this Order.**

Id. (emphasis in original). The Order showed the Aggrieved Party's name, mailing address, and e-mail address and indicated that it was served on him "by DAB E-File." *Id.* at 4.

The ALJ issued Decision No. CR4832, captioned “Decision Dismissing Complaint,” on April 25, 2017, stating in part: “The Aggrieved Party has not filed a response to my Order, and he has not otherwise submitted an amended complaint in compliance with my Order. As the Aggrieved Party has not submitted an acceptable complaint despite being given the opportunity amend his complaint, I dismiss the complaint pursuant to 42 C.F.R. § 426.410(c)(2).” Decision at 3. The Civil Remedies Division’s cover letter was addressed to the Aggrieved Party at the same name, mailing address and e-mail address as the Order, and indicated that it was served by DAB E-File. 4/25/2017 ltr., 1st page.

On May 11, 2017, the Aggrieved Party filed an appeal, dated May 10, 2017, with the Board in accordance with 42 C.F.R. § 426.465 and attached a copy of a May 10, 2017 letter to the ALJ seeking reconsideration of the ALJ Decision.¹ The Board stayed the proceedings pending the issuance of a ruling by the ALJ on the request for reconsideration. App. Div. ltr. dated 5/15/17.

In its request for reconsideration, the Aggrieved Party alleged that he “did not receive actual notice of the March 22, 2017 Order through the DAB E-File system” and was therefore “not afforded an opportunity to submit an acceptable amended complaint within a reasonable timeframe, consistent with 42 C.F.R. § 426.410(c)(1)” before his complaint was dismissed. 5/10/17 ltr., 2nd page. According to the Aggrieved Party, “[d]uring the pendency of my LCD Complaint, the e-mail address used to create an account and electronically submit my LCD Complaint in the DAB E-File system was not working.” *Id.* at 1. The Aggrieved Party further alleged that he “first learned about” the ALJ’s Order and Decision, “and the need to amend my LCD Complaint, this week, after people assisting [me to] navigate the LCD Complaint process and DAB E-Filing system checked the DAB’s E-Filing system, discovered my LCD Complaint had been closed, and contacted me to convey this information.” *Id.* The Aggrieved Party attached to his submission a May 10, 2017 letter from his treating physician stating that he originally signed his written statement “[o]n or about February 22, 2017.” Attached to the physician’s letter is a copy of the physician’s written statement, to which he had added that date and his initials.

¹ DAB E-File shows that the Deputy Director of the Civil Remedies Division uploaded the Aggrieved Party’s request for reconsideration to the record for the initial proceedings on his complaint (Docket No. C-17-457). According to the Deputy Director, the Aggrieved Party e-filed his request for reconsideration using the screen on DAB E-File for filing a new appeal.

On May 26, 2017, the ALJ issued an order denying the Aggrieved Party's request for reconsideration. The ALJ first concluded that she had no authority to reopen or reconsider a decision issued pursuant to 42 C.F.R. Part 426 since those regulations do not contain any express provision authorizing the ALJ to do so and "the Aggrieved Party has not demonstrated that I am authorized to reopen or reconsider the April 25, 2017 decision." 5/26/17 ALJ Order at 2. The ALJ further concluded that "even if I have the authority to reopen or reconsider the previous decision, the Aggrieved Party has not demonstrated that reopening or reconsideration is warranted in this instance." *Id.* at 3. The ALJ explained—

The Aggrieved Party enrolled in DAB E-File prior to filing his complaint, and in doing so, he agreed that my office, the Civil Remedies Division (CRD), "will use that system to issue and serve upon the parties any notice, order, ruling, or decision" and that the CRD "will not mail paper copies to the parties" DABE-File registration website, https://dab.efile.hhs.gov/appeals/to_crd_instructions?locale=en, last visited May 23, 2017. . . . While the Aggrieved Party now contends that the email address he used when he enrolled to enroll in DAB E-File . . . "was not working" throughout the entire course of his previous complaint prior to its dismissal, I observe that the Aggrieved Party continues to list that same email account . . . in the DAB E-File system and used DAB E-File to submit his letter requesting reopening and reconsideration of the April 25, 2017 decision. Further, if the Aggrieved Party's email account was not working during the course of the previous case, he should have updated his information in DAB E-File to reflect a current and operational email address. In addition, if the Aggrieved Party was having difficulty accessing his email account, he should have regularly checked the DAB E-File website in order to be aware of the status of his case. In fact, the Aggrieved Party stated, in his May 10, 2017 letter, that he or someone on his behalf will log into DAB E-File and check the status of his complaint. The Aggrieved Party has not shown that he did not receive notice of the March 22, 2017 Order informing him he had not submitted an acceptable complaint and that action was required within 30 days. Nor has the Aggrieved Party shown good cause for his failure to submit an acceptable complaint after being given a reasonable amount of time to do so.

5/26/17 ALJ Order at 2-3.

The Aggrieved Party advised the Board by letter dated June 9, 2017 that he wished to pursue his appeal to the Board, stating—

For reasons set forth more fully in my May 10, 2017 Appeal Letter,^[2] I believe that good cause exists for reopening my LCD complaint, including but not limited to: the fact that I am over eighty years old; I attempted in good faith to comply with the agency's requirement that my LCD complaint be submitted via the agency's e-file system; when I discovered the issue with my email, I took prompt action to respond to the ALJ's request for further information and monitor the e-docket going forward; and the record now clearly shows that my treating physician signed his written statement on the same date that I signed my complaint, and thus my complaint is timely.

Discussion

This case presents the threshold issue of whether the ALJ had authority to reconsider her decision dismissing the Aggrieved Party's LCD complaint based on her determination that the complaint is unacceptable. The ALJ here concluded that she lacked such authority because the Part 426 regulations contain no express authority for reconsideration. 5/26/17 ALJ Order at 2. The Board has similarly considered whether, absent express regulatory authority, it may reconsider a decision it has issued in an appeal governed by the procedures in 42 C.F.R. Part 1005 (providing for review of ALJ decisions regarding civil money penalties imposed by the Inspector General). In *Henry L. Gupton*, Ruling No. 2007-1 on Request for Reconsideration of Decision No. 2058 (March 14, 2007), the Board concluded that it had such authority, stating: "Generally, a decision-maker has inherent authority to reopen and reconsider a decision even in the absence of express authorization in its procedures. Such authority serves the Department by ensuring fair process and sound decisions." *Gupton* at 2. We see no reason why this rationale should not apply here. Accordingly, contrary to what she concluded, the ALJ was not precluded from reconsidering her decision to dismiss the appeal. However, her conclusion is harmless error since the ALJ went on to consider the arguments the Aggrieved Party made in his request for reconsideration.

Moreover, we find no error in the ALJ's decision or her order reaffirming her decision dismissing the Aggrieved Party's complaint. The applicable regulations require an ALJ to dismiss an unacceptable complaint after giving the aggrieved party an opportunity to file an amended complaint within an acceptable timeframe. 42 C.F.R. § 426.410(c)(2). The Aggrieved Party does not dispute that the complaint he filed was unacceptable. Nor does the Aggrieved Party argue that the 30-day timeframe provided by the ALJ for filing

² The Aggrieved Party's May 10, 2017 appeal contains language similar to that in his request for reconsideration.

an amended complaint was *per se* unreasonable. Instead, the Aggrieved Party argues principally that he was not afforded an opportunity to file an amended complaint within a reasonable timeframe because he did not receive “actual notice” of the March 22, 2017 ALJ Order before the 30-day period set by the ALJ expired. This argument has no merit.

When the Civil Remedies Division uploads a document, such as the ALJ Order here, to DAB E-File, DAB E-File automatically e-mails the parties a notification that includes a link to access the newly uploaded document on the DAB E-File website. Civil Remedies Division Procedures at 5 (*Electronic service of documents*). The ALJ Order indicates that it was to be sent via DAB E-File to the Aggrieved Party at the e-mail address he used to register for DAB E-File. The notification log for Civil Remedies Division cases (part of the DAB’s internal case tracking system) shows that DAB E-File notifications for the ALJ Order (and other issuances in the Aggrieved Party’s case) were sent to the Aggrieved Party at that e-mail address. The system administrator for DAB E-File verified that none of these e-mailed notifications “bounced back” to the e-mail server for DAB E-File. E-mail to Appellate Division dated 8-9-17. Thus, the March 22, 2017 ALJ Order was served on the Aggrieved Party when DAB E-File sent a notification to his e-mail address that an order had been uploaded.

As noted, the Aggrieved Party maintained that he did not receive “actual notice” of the March 22, 2017 ALJ Order because “[d]uring the pendency of my LCD Complaint, the e-mail address used to create an account and electronically submit my LCD Complaint in the DAB E-File system was not working.” Request for Reconsideration at 1. However, the alleged lack of actual notice is immaterial since, as discussed above, the March 22, 2017 ALJ Order was served on the Aggrieved Party via DAB E-File and was accessible to him through the website at all relevant times. In any event, the Aggrieved Party’s general allegation that his e-mail address “was not working” while his LCD complaint was pending before the ALJ is not sufficient to establish that he did not receive actual notice of the order that was served on him. The Aggrieved Party did not explain, much less document, what he meant in saying that his e-mail address was not working, how and when he discovered it was not working, and under what circumstances it began to work again.

The Aggrieved Party’s appeal also cites as a basis for a finding of good cause that he is over 80 years old. Ltr. dated 6/9/17. The Aggrieved Party may have intended to suggest that it is not reasonable to expect someone of his advanced age to deal with problems involving the use of modern technology such as e-mail and e-filing. We reject this

suggestion. In registering to use DAB E-File, the Aggrieved Party agreed that he would accept electronic service of all documents in the case by via DAB E-File. If he did not wish to do so, he could have requested that the ALJ waive the requirement for e-filing and permit him to file and receive paper documents by mail.³

The Aggrieved Party also asserts that there was good cause for his failure to file an amended complaint within the 30-day period because he “took prompt action” when he discovered that the ALJ had issued an order and provided information from his physician that shows that his complaint was timely filed.⁴ Ltr. dated 6/9/17. However, what the Aggrieved Party did after he missed the 30-day deadline does not constitute good cause for missing the deadline in the first instance.

Conclusion

For the foregoing reasons, we uphold the ALJ’s dismissal of the Aggrieved Party’s LCD complaint. Pursuant to 42 C.F.R. § 426.410(c)(3), the Aggrieved Party may file another complaint “6 months after being informed” that his complaint was unacceptable.

/s/

Constance B. Tobias

/s/

Susan S. Yim

/s/

Leslie A. Sussan
Presiding Board Member

³ The Civil Remedies Division instructions on the DAB E-File website state in part that “paper filing of documents . . . remains available for parties unable to file electronically.” Using the Departmental Appeals Board Electronic Filing System (“DAB E-File”) For Cases Before the Civil Remedies Division, available at https://dab.efile.hhs.gov/appeals/to_crd_instructions?locale=en.

⁴ For purposes of this appeal, we do not reach the question of whether the Aggrieved Party has shown that his complaint was timely.