

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Bruce G. Manley, PAC,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-856

ALJ Ruling No. 2017-10

Date: February 17, 2017

DISMISSAL

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, revoked the Medicare billing privileges of Bruce G. Manley (Mr. Manley or Petitioner). Mr. Manley requested reconsideration of the revocation; however, the CMS administrative contractor dismissed the reconsideration request as untimely. Mr. Manley requested a hearing before an administrative law judge (ALJ) to further dispute the revocation. Because the initial revocation determination is now binding and Mr. Manley has no right to ALJ review of the dismissal of his reconsideration request, I dismiss Mr. Manley's request for hearing.

I. Background

Mr. Manley has been licensed in the state of Maine as a physician assistant since December 18, 1998. CMS Exhibit (Ex.) 1 at 14; CMS Ex. 2 at 1, 3. In September 2014, Mr. Manley applied to enroll in the Medicare program as a supplier. CMS Ex. 1 at 1-15; 42 C.F.R. § 498.2 (definition of *Supplier*). Mr. Manley informed CMS that his address for correspondence purposes was 409 Roosevelt Trail, Windham, Maine. CMS Ex. 1 at 4; CMS Ex. 10 at 1. On November 20, 2014, a CMS administrative contractor approved Mr. Manley's enrollment, effective September 2014. CMS Ex. 1 at 17; CMS Ex. 10 at 1. Since before his enrollment in the Medicare program, Mr. Manley suffered from depression and substance abuse issues. In October 2014, Mr. Manley attended an

intensive outpatient program to address these issues and voluntarily participated in Maine's Medical Professional Health Program, which periodically tested him for use of controlled substances. In April 2015, Mr. Manley consumed unprescribed morphine, which was detected in a toxicology screen conducted by the Medical Professional Health Program. As a result, Mr. Manley received additional treatment and was subsequently terminated from his position at a medical center in August 2015. Petitioner (P.) Ex. 1 at 1-3. Following his termination from the medical center, Mr. Manley did not inform CMS of the change in his employment or the correspondence address that he provided on his September 2014 enrollment application. CMS Ex. 10 at 2.

Due to the positive toxicology test, the Maine Board of Licensure in Medicine initiated a proceeding against Mr. Manley. In October 2015, Mr. Manley resolved the proceeding by entering into a Consent Agreement in which he accepted the following discipline: a reprimand for misuse of drugs and for working after ingesting a controlled substance not prescribed to him; a \$1,000 civil penalty; and a five-year period of probation, which required total abstinence from use or possession of prohibited substances, and enrollment and completion of the Maine Medical Professionals Health Program. CMS Ex. 2 at 3-9; P. Ex. 1 at 3. Although Mr. Manley kept his physician assistant license, that license became inactive because he had lost his job and no longer had a supervising physician. P. Ex. 1 at 4; *see also* CMS Ex. 7; CMS Ex. 8 at 2, 4.

Apparently CMS learned that Mr. Manley's license became inactive because, on December 11, 2015, a CMS administrative contractor revoked Mr. Manley's Medicare billing privileges for noncompliance with Medicare enrollment requirements and barred Mr. Manley from reenrolling for a year. This initial determination to revoke Medicare billing privileges also informed Mr. Manley that he could request reconsideration within 60 days of the postmark date of the initial determination. The CMS administrative contractor mailed the initial determination to the correspondence address Mr. Manley provided in his September 2014 enrollment application, which was delivered to and signed for by someone at that address. CMS Ex. 3.

Mr. Manley asserts that he did not receive the initial determination. Rather, by the end of 2015, Mr. Manley started to seek a physician assistant position with a medical center and by the Spring of 2016, received an interview and a job offer. Because Mr. Manley once again had a physician to supervise him, his state license was reactivated. P. Ex. 1 at 4; *see also* CMS Ex. 7 (Maine Board of Medical Licensure in Medicine certification that Mr. Manley's license was not active from September 2, 2015 to May 22, 2016). Mr. Manley filed an enrollment application to reactivate his Medicare billing privileges, which the CMS administrative contractor received on May 23, 2016. CMS Ex. 4. However, the CMS administrative contractor closed the application on June 8, 2016, due to the reenrollment bar associated with Mr. Manley's revocation. CMS Ex. 10 at 2.

On June 8, 2016, the CMS administrative contractor informed Mr. Manley that he was ineligible to reenroll in the Medicare program until January 9, 2017, because his license had lapsed. P. Ex. 1 at 5. On June 9, 2016, Mr. Manley sent the CMS administrative contractor a written statement that his license had not lapsed, but merely was inactive during the period of time when he did not have a physician to supervise him. CMS Ex. 5; P. Ex. 1 at 5. Mr. Manley also submitted an enrollment application seeking again to reactivate his Medicare billing privileges, which the CMS administrative contractor received on June 13, 2016. CMS Ex. 6 at 4-7; P. Ex. 1 at 5. The CMS administrative contractor apparently construed Mr. Manley's correspondence and enrollment application as a reconsideration request and, on June 29, 2016, issued a dismissal of that request because Mr. Manley did not timely file it. CMS Ex. 6 at 1-3; P. Ex. 1 at 5. The dismissal indicated that Mr. Manley could request an ALJ hearing to appeal its decision to dismiss the request for reconsideration. CMS Ex. 6 at 2.

On August 26, 2016, Mr. Manley requested a hearing before an ALJ. On September 15, 2016, I issued an Acknowledgement and Pre-hearing Order that provided dates for the submission of exchanges by the parties. In response, CMS filed a motion to dismiss along with ten exhibits. Petitioner filed a brief in opposition and one exhibit, which was Mr. Manley's written direct testimony.

II. Discussion

It is not disputed that the CMS administrative contractor has not issued a reconsidered determination in this case. As explained below, in supplier enrollment and revocation matters, an ALJ may only review the reconsidered determination. Therefore, unless and until the CMS administrative contractor issues such a determination, a supplier has no right to an ALJ hearing.

When CMS revokes the Medicare billing privileges of a supplier, it is an appealable initial determination. 42 C.F.R. § 498.3(b)(17). In order to revoke a supplier's Medicare billing privileges, CMS or one of its administrative contractors must issue a notice to the supplier providing the reasons for the revocation and that the supplier has the right to appeal the revocation. 42 C.F.R. §§ 405.800(b), 498.20(a). The supplier has appeal rights as stated in 42 C.F.R. part 498. 42 C.F.R. §§ 405.803(a), 424.545(a). For revocation cases, the first level of appeal is for the supplier to request reconsideration 60 days after receipt of the initial determination to revoke. 42 C.F.R. §§ 498.5(l)(1), 498.22. CMS may accept an untimely reconsideration request if the supplier shows good cause. 42 C.F.R. §§ 498.5(l)(1), 498.22(d)(2). The initial determination to revoke becomes binding unless timely appealed. 42 C.F.R. § 498.20(b). If a supplier requests

reconsideration and CMS or its administrative contractor issues a reconsidered determination, then the supplier may request a hearing before an ALJ. 42 C.F.R. §§ 498.5(l)(2), 498.25(a)(3), 498.40(a).

The Departmental Appeals Board (DAB) has interpreted these regulations to conclude that in order for a supplier to have a right to an ALJ hearing, CMS or the CMS administrative contractor must have first issued a reconsidered determination. *Denise A. Hardy, D.P.M.*, DAB No. 2464 at 4-5 (2012); *Hiva Vakil, M.D.*, DAB No. 2460 at 4 (2012). The DAB has specifically found that ALJs may not review whether CMS or a CMS administrative contractor correctly determined whether there was good cause for a supplier to file an untimely reconsideration request. *Better Health Ambulance*, DAB No. 2475 at 4 (2012). Further, the DAB has concluded that CMS's decision to dismiss or reject an untimely reconsideration request is not a reconsidered determination and thus, is not subject to ALJ review. *Karthik Ramaswamy*, DAB No. 2563 (2014) (en banc) *aff'd Ramaswamy v. Burwell*, 83 F. Supp. 3d 846 (E.D. MO 2015).

In the present case, although Petitioner asserts that he did not receive the CMS administrative contractor's initial determination to revoke him, I have no authority to review the decision to dismiss his reconsideration request as untimely. Because the dismissal itself is not a reconsidered determination, Petitioner does not have a right to an ALJ hearing. Therefore, I dismiss Petitioner's hearing request. 42 C.F.R. § 498.70(b).

III. Conclusion

I grant CMS's motion and dismiss Petitioner's request for hearing.

_____/s/_____
Scott Anderson
Administrative Law Judge