DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

ORDER OF MEDICARE APPEALS COUNCIL
REMANDING CASE TO ADMINISTRATIVE LAW JUDGE
Docket Number: M-12-2933

In the case of	**Claim for**
Vision Quest Industries (Appellant)	Supplementary Medical Insurance Benefits (Part B)
**** (Beneficiaries)	**** (HIC Numbers)
DME MAC – Jurisdiction C (Contractor)	**** (ALJ Appeal Number)

The Administrative Law Judge (ALJ) issued an order, dated July 26, 2012, dismissing the appellant's timely filed requests for an ALJ hearing relative to claims for Medicare coverage of the BioniCare Stimulator, Model BIO-1000 (BIO-1000), an item of durable medical equipment (DME), and related supplies which the appellant had furnished to multiple beneficiaries on various dates of service in 2010 and 2011. The ALJ concluded that, pursuant to 42 C.F.R. § 405.1052(a)(6), he did not have jurisdiction over the appellant's claims. The appellant has asked the Medicare Appeals Council to review this action. The appellant's request for review is entered into the record as Exhibit (Exh.) MAC-1.

The Council may deny review of an ALJ's dismissal or vacate the dismissal and remand the case to the ALJ for further proceedings. 42 C.F.R. § 405.1108(b). The Council will dismiss a request for review when the party requesting review does not have a right to a review by the Council. The Council may also dismiss the request for a hearing for any reason that the ALJ could have dismissed the request for hearing. 42 C.F.R. § 405.1108(c).

For the reasons provided below, the Council concludes that the ALJ erred in dismissing the requests for hearing pursuant to 42 C.F.R. § 405.1052(a)(6). We therefore vacate the ALJ's dismissal order and remand the case to the ALJ for further proceedings, to include the opportunity for a hearing. 42 C.F.R. §§ 405.1108(a), 405.1128(a).

BACKGROUND

In 2010 and 2011, the appellant provided the BIO-1000 to seventy-seven beneficiaries. In beneficiary-specific claims, the appellant billed Medicare for reimbursement of the DME under HCPCS[1] code E0762. Both initially and upon redetermination the Durable Medical Equipment Medicare Administrative Contractor (DME MAC) denied coverage. Upon reconsideration the Qualified Independent Contractor (QIC) also denied coverage. The appellant timely filed beneficiary-specific requests for ALJ hearings, whereupon each request was assigned a specific ALJ appeal number. On May 7, 2012, the ALJ issued an order in which he "combined and/or aggregated" each request for hearing under the ALJ appeal number identified in this case caption.[2]

The ALJ subsequently dismissed the appellant's request for hearing recounting that the appellant was seeking "coverage for the very device, the BIO-1000, that has been considered and denied coverage as a matter of law by the Secretary." Order at 15. The ALJ based his order upon 42 C.F.R. § 405.1052(a)(6), which permits an ALJ to dismiss -

> a hearing request entirely or refuse[] to consider any one or more of the issues because a QIC, an ALJ or the MAC [Council] has made a previous determination or decision under this subpart about the appellant's rights on the same facts and on the same issue(s) or claim(s), and this previous determination or decision has become binding by either administrative or judicial action.

The ALJ noted that not only had the question of coverage for the BIO-1000 been adjudicated (unfavorably) in numerous ALJ and

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[1] The Centers for Medicare & Medicaid Services (CMS) has developed the Healthcare Common Procedure Coding System (HCPCS) to establish "uniform national definitions of services, codes to represent services, and payment modifiers to the codes." 42 C.F.R. § 414.40(a).

[2] Hereafter, the Council refers to the requests in the singular.

Council decisions, but the United States Court of Appeals for the Fourth Circuit had recently upheld a Council decision, denying coverage for the BIO-1000. Consequently, the ALJ determined that he did not have jurisdiction over the appellant's claims. Order at 15-16.

In its request for review, the appellant poses two overarching questions –

> 1. Can an ALJ refuse to provide an Appellant with a *de novo* hearing when the Appellant has requested such and has not waived its request?
>
> 2. Can an ALJ refuse to provide an Appellant with a *de novo* hearing and refuse to consider new evidence that has evolved since prior hearings on the durable medical equipment . . . that is the subject of Appellant's request for hearing?

Exh. MAC-1 at 1-2.

The appellant then argues, at length, that the ALJ's order was based on both errors of law and fact. Exh. MAC-1 at 2-10.

DISCUSSION

The Council has carefully considered the ALJ's order and the appellant's arguments in the context of the applicable regulations, and concludes that the Administrative Law Judge erred in dismissing the appellant's request for hearing. As explained below, the Council's remand is based upon errors of law in the ALJ's order. In reaching its conclusion, the Council has not considered, nor does it offer an opinion upon, the alleged factual errors in the ALJ's order, as the appellant's arguments relative to such errors largely pertain to the substantive question of coverage for *these* claims, which has yet to be decided by an ALJ.

The question of Medicare coverage for the BIO-1000 has been adjudicated at the administrative and, more recently, the federal court level. However, the appellant timely requested a hearing(s) before an ALJ. Order at 1. Moreover, the appellant did not subsequently waive its right to a hearing or formally withdraw its hearing requests. *See* 42 C.F.R. §§ 405.1000(e) and 405.1052(a)(1).

The regulation at 42 C.F.R. § 405.1052(a)(6) does permit an ALJ to dismiss a request for hearing where a QIC, an ALJ or the Council "has made a previous determination or decision . . . about the appellant's rights on the same facts and on the same issue(s) or claim(s), and this previous determination or decision has become binding by either administrative or judicial action."

The ALJ has, in essence, issued this order based upon a theory that 42 C.F.R. § 405.1052(a)(6) establishes *res judicata*. To the extent that CMS has specifically addressed *res judicata* in this context, it noted in the preamble to the proposed rules establishing 42 C.F.R. § 405.1052, that -

> SSA regulations at 20 CFR 404.957(c)(1) provide that an ALJ may dismiss a request for hearing based on the doctrine of res judicata. We are including this provision in our new regulations but clarifying that in the Medicare context the issue will most often occur when a party asks for another adjudication of a claim for the same date of service based on the same facts and evidence and the previous decision on the claim is either administratively or judicially final.

67 Fed. Reg. 69312, 69334 (Nov. 15, 2002).

Both ALJs and the Council are charged with conducting *de novo* reviews of claims for Medicare coverage. *See* 42 C.F.R. §§ 405.1000(d) and 405.1100(c). However, to the extent an ALJ's or Council's decision becomes a final action (s*ee* 42 C.F.R. §§ 405.1048 and 405.1130) that action is binding only as it pertains to the facts of the case underlying the decision. While the question of coverage for the BIO-1000 has been adjudicated in a multitude of claim settings, the Council finds no evidence of record, nor did the ALJ's order indicate, that coverage for these specific claims for these specific beneficiaries has been previously resolved by an ALJ. And the Council has no record of its adjudication of an appeal of an ALJ's decision on the merits of the underlying beneficiary claims docketed under ALJ appeal number ****.

The applicable program regulations which describe the ALJ hearing process provide that "[a]ny party to a hearing has a right to appear before an ALJ to present evidence and to state his or her position." 42 C.F.R. § 405.1036(a)). The party also has a right to waive the hearing. *See* 42 C.F.R. §§ 405.1020(d)

and 405.1036(b). These rights belong to the party to a hearing, however, and there is no provision in the regulations which confers authority on an ALJ to dispense with the opportunity for a hearing before issuing an unfavorable decision. *Cf.* 42 C.F.R. § 405.1038 (the ALJ may issue a favorable decision on the record but must still inform the parties that they have a right to a hearing).

In addition, the non-adversarial Medicare appeals process which governs this appeal does not provide for summary judgment. Further, as referenced above, the appellant contests the agency's factual finding that the BIO-1000 is not reasonable and necessary. *See, generally,* Exh. MAC-1 at 7-10. Thus, there is a genuine dispute of material fact.

Accordingly, the ALJ erred in dismissing the appellant's request for hearing.

ORDER OF REMAND

The Medicare Appeals Council remands this case to an ALJ for further proceedings that will include the opportunity for a *de novo* hearing and a review on the merits, based upon the coverage criteria in applicable legal authorities, of each beneficiary-specific appeal. 42 C.F.R. § 405.1108(a). The ALJ will issue a notice of hearing to the parties consistent with all applicable regulations.

MEDICARE APPEALS COUNCIL

/s/ Susan S. Yim
Administrative Appeals Judge

/s/Constance B. Tobias, Chair
Departmental Appeals Board

Date: December 6, 2012