

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Haissam Elzaim, M.D.,  
(NPI: 197272383),  
Southern Texas Physician Network,  
HSE Orthopaedic Surgery Clinic,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-12-643

Decision No. CR2650

Date: October 17, 2012

**DECISION DISMISSING CASE**

This matter is before me on my own motion, *sua sponte*, to dismiss this matter pursuant to 42 C.F.R. § 498.70(b) because Petitioner does not have a right to an Administrative Law Judge (ALJ) hearing. As detailed below, the initial determination by TrailBlazer Health Enterprises, LLC (TrailBlazer), a contractor for the Centers for Medicare & Medicaid Services (CMS), became administratively final after Petitioner failed to timely request reconsideration of that determination. 42 C.F.R. § 498.5(1)(2). Because Petitioner did not timely request a reconsidered determination, he has forfeited his right to the contractor's reconsideration as well as to an ALJ hearing.

**I. Background**

On November 10, 2011, TrailBlazer issued a notice revoking Dr. Elzaim's Medicare enrollment and billing privileges related to his reassignment of benefits to Southern Texas Physician Network, and instituted a one-year bar on re-enrollment. P. Ex. 3. On February 14, 2012, Petitioner filed his request for reconsideration. P. Ex. 5A. On

March 7, 2012, the contractor denied Petitioner's request for reconsideration due to untimely filing. P. Ex. 7.

Soon thereafter, Petitioner requested an ALJ hearing contesting the revocation. On May 31, 2012, Petitioner filed a Motion for Summary Judgment and nine supporting exhibits (P. Exs. 1-9). On July 16, 2012, CMS filed its Opposition to Petitioner's Motion for Summary Judgment, in what amounted to a cross-motion. Petitioner filed a response entitled Petitioner's Response to CMS' Opposition to Summary Judgment on August 15, 2012.

## II. Discussion

Although the parties filed opposing Motions for Summary Judgment, the crux of this case is that Petitioner did not timely request a reconsideration decision and the contractor never issued one. Without a reconsideration decision, Petitioner does not have a right to an ALJ hearing. 42 C.F.R. § 498.5(1)(2).

Determination of the effective date of enrollment is an "initial determination" that is subject to the review procedures set forth in 42 C.F.R. Part 498. 42 C.F.R.

§§ 498.3(a)(1), (b)(17). Under the review procedures in Part 498, a provider or supplier "dissatisfied with an initial determination or revised initial determination related to the denial or revocation of Medicare billing privileges may request reconsideration in accordance with § 498.22(a)." 42 C.F.R. § 498.5(1)(1). Section 498.22(a) states that CMS or one of its contractors "reconsiders an initial determination that affects a prospective provider or supplier . . . if the affected party files a written request in accordance with paragraphs (b) and (c) of this section." Section 498.22(b) provides, in relevant part, that the affected party may request reconsideration if the party files the request "[w]ithin 60 days from receipt of the notice of initial determination, unless the time is extended in accordance with paragraph (d) of this section." 42 C.F.R.

§ 498.22(b)(3). Section 498.22(d)(1) states that a party "unable to file the request within 60 days . . . may file a written request with CMS, stating the reasons why the request was not filed timely." CMS will extend the 60-day deadline for filing a request for reconsideration "if the affected party shows good cause for missing the deadline." If the affected party does not request reconsideration of an initial determination, then the initial determination is binding. 42 C.F.R. § 498.20(b).

The regulations are clear that Petitioner must file a reconsideration request in accordance with section 498.22. Without a reconsidered determination by the contractor, the initial determination is "binding" and, therefore administratively final. 42 C.F.R. § 498.20(b). Moreover, the regulations plainly require that CMS or one of its contractors must issue a "reconsidered determination" before the affected party is entitled to request a hearing before an ALJ. 42 C.F.R. § 498.5(1)(2); *see Hiva Vakil, M.D.*, DAB No. 2460 (2012); *Denise A. Hardy, D.P.M.*, DAB No. 2464 (2012).

Here, the contractor's initial determination was issued on November 10, 2011. P. Ex. 3. About 96 days after the initial determination, Petitioner requested contractor reconsideration in a letter dated February 14, 2012. P. Ex. 5A. The contractor denied Petitioner's request for reconsideration because it was not timely requested pursuant to section 498.22. P. Ex. 7. The contractor, therefore, did not issue a "reconsidered determination" as described by the regulations. Accordingly, the initial determination is binding and administratively final. 42 C.F.R. § 498.20(b).

As stated, the "regulations plainly require that CMS or one of its contractors must issue a 'reconsidered determination' before the affected party is entitled to request a hearing before an ALJ." *Hiva Vakil, M.D.*, DAB No. 2460, at 4, *citing* 42 C.F.R. § 498.5(1)(2). Without a reconsidered determination, Petitioner's initial determination is the final administrative determination and Petitioner has no right to an ALJ hearing thereon. *Hiva Vakil, M.D.*, DAB No. 2460, at n.4.

### **III. Conclusion**

Accordingly, Petitioner's request for hearing and this case must be, and they are, DISMISSED pursuant to 42 C.F.R. § 498.70(b) because Petitioner does not have a right to an ALJ hearing on this matter. The contractor's revocation of Dr. Elzaim's Medicare enrollment and billing privileges related to his reassignment of benefits to Southern Texas Physician Network, and the one-year bar on re-enrollment as announced in the contractor's initial determination notice are final, not subject to review, and remain in force exactly as announced by the contractor.

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/s/  
Richard J. Smith  
Administrative Law Judge