

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

NBM Healthcare Inc.,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-679

Decision No. CR2500

Date: February 10, 2012

**DECISION DENYING MOTION TO RECONSIDER ORDER
DISMISSING CASE**

I deny the motion of Petitioner, NBM Healthcare, Inc., to reconsider a previous order dismissing this case. Petitioner has not shown good cause pursuant to 42 C.F.R. § 498.72 for vacating the Order Dismissing Case that Administrative Law Judge (ALJ) Steven T. Kessel issued on November 23, 2011.

On January 27, 2012, Petitioner filed a Motion to Reconsider Order Dismissing Case (Motion) accompanied by three exhibits (P. Exs. 1-3). ALJ Kessel previously issued an order dismissing this matter for abandonment pursuant to 42 C.F.R. § 498.69. Because ALJ Kessel subsequently left the Civil Remedies Division (CRD) of the Departmental Appeals Board, this matter was transferred to me upon receipt of Petitioner's Motion.

This matter was dismissed after Petitioner failed to file its pre-hearing exchange and subsequently failed to respond to an Order to Show Cause. P. Ex. 1. Petitioner now claims that its previous attorney did not keep Petitioner's officers apprised of the status of this case. Petitioner states that it "did not know about the deadline for a pre-hearing exchange, did not know that [its former attorney] had failed to file a pre-hearing

exchange, have not seen CMS's pre-hearing exchange, did not know that the Court had issued a show cause order, and did not know that [its former attorney] had failed to respond to the show cause order." Motion at ¶ 3. Petitioner claims it did not learn of the Order Dismissing Case until December 8, 2011, when a copy of the Order was forwarded to Petitioner by email, and "[t]his notice came in the midst of an enormous, multi-state transaction that was consuming the attention of each of Petitioner's officers, followed by an equally daunting transition period that is ongoing, which has prevented the officers from focusing on this Case." Motion at ¶ 3.

Petitioner also explains that, subsequent to the filing of the Order Dismissing Case,¹ Petitioner's former attorney filed a voluntary withdrawal of appeal. Motion at ¶ 2; P. Ex. 2. Petitioner states that it did not know that its former attorney had filed the voluntary withdrawal, and Petitioner did not authorize this filing.

Petitioner has since retained new counsel and now requests that the CRD reconsider the November 23, 2011 Order Dismissing Case and "give Petitioner one last chance to appeal the CMS decision underlying this Case." Motion at ¶ 4. Petitioner also included an Affidavit of Petitioner's Vice President in support of Petitioner's Motion. P. Ex. 3. In addition to the reasons listed above, Petitioner's Vice President states:

[Petitioner] retained the services of . . . a law firm in Kentucky to help [Petitioner] with the appeal. . . . A principal with the firm . . . told the officers of [Petitioner], including me, that she was making progress in discussions with CMS. Being put at ease [Petitioner's] officer's, who work with several home health agencies across the nation, turned to another matter; the sale of multiple home health agencies That transaction involved constant work on the part of [Petitioner's] officers, particularly in the month of December. On or about December 8, in the middle of the work on the transaction, I was notified, via email, for the first time, of the Order Dismissing Case and the filing . . . of a Voluntary Withdrawal of Appeal. I reviewed the Order and the Withdrawal and was, quite frankly, stunned

P. Ex. 3.

Finally, Petitioner's Vice President states that, "[b]ecause of the transaction, [Petitioner's] officers did not have time to focus on the notification. . . . [Petitioner] has retained new counsel, has put in place a mechanism for routine updates on this Case, and will not, ever, allow another deadline to pass without the Court's permission." P. Ex. 3.

¹ I note that Petitioner's Voluntary Withdrawal of Appeal is dated November 23, 2011, the same date that ALJ Kessel issued the Order Dismissing Case for abandonment. P. Ex. 2.

An ALJ may vacate a dismissal of a request for hearing if the party files a request to vacate within 60 days from receipt of the dismissal notice, and the party shows good cause for vacating the dismissal. 42 C.F.R. § 498.72. A definition of “good cause” does not exist in the applicable regulations, and the “[Departmental Appeals] Board has never attempted to provide an authoritative or complete definition of the term ‘good cause’” *Hillcrest Healthcare, L.L.C.*, DAB No. 1879, at 5 (2003).

Other ALJ’s have interpreted the term “good cause” as a circumstance or circumstances beyond the party-litigant’s ability to control. *See, e.g., Sedgewick Health Care Ctr.*, DAB CR596 (1999); *Jackson Manor Health Care, Inc.*, DAB CR545 (1998). One ALJ stated that “the avoidable failure of counsel to discharge responsibilities on a [party’s] behalf or the miscommunication between a [party] and its counsel have been found to constitute avoidable human error, rather than circumstances beyond the [party’s] ability to control.” *Cnty. Care Ctr. of Seymour*, DAB CR758 (2001). The ALJ also stated that “delays or failures of communication caused by Petitioner’s former counsel, or resulting from counsel’s withdrawal, were entirely within Petitioner’s control. It was Petitioner’s ultimate responsibility, as the party in interest, to remain apprised of the status of its appeal, and to take whatever steps were necessary to continue its appeal once counsel withdrew.” *Id.* *See also Sedgewick Health Care Ctr.*, DAB CR596 (finding a misunderstanding between petitioner and its counsel avoidable human error).

Similarly, I find here that the failure of Petitioner’s former legal counsel to keep Petitioner’s officers apprised of the status of this case does not form the basis for a good cause determination. Moreover, Petitioner’s explanation that it did not learn of the Order Dismissing Case until December 8, 2011, and “[t]his notice came in the midst of an enormous, multi-state transaction that was consuming the attention of each of Petitioner’s officers . . . which has prevented the officers from focusing on this Case” also does not demonstrate a basis for good cause. Finally, Petitioner’s statement that it “has retained new counsel, has put in place a mechanism for routine updates on this Case, and will not, ever, allow another deadline to pass” is not sufficient to establish good cause either. The circumstances Petitioner has presented, while regrettable, were not beyond its ability to control and do not establish the good cause necessary to vacate ALJ Kessel’s dismissal. Accordingly, I must deny Petitioner’s Motion.

/s/
Joseph Grow
Administrative Law Judge