

**Department of Health and Human Services  
DEPARTMENTAL APPEALS BOARD  
Appellate Division**

Sunview Care & Rehab Center LLC  
Docket No. A-16-27  
Decision No. 2713  
June 15, 2016

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

Sunview Care & Rehab Center, LLC (Sunview, Petitioner), by Samuel Pinter (Mr. Pinter), appeals an Administrative Law Judge's (ALJ's) Order of Dismissal (Dismissal) of a request for hearing on a March 17, 2015 notice of termination of Sunview's Medicare and Medicaid provider agreement and imposition of civil money penalties. The ALJ concluded that Mr. Pinter had not documented that he was the proper party to appeal or otherwise had a right to request a hearing on Sunview's behalf. Accordingly, the ALJ dismissed the request for hearing. *Sunview Care & Rehab Center LLC*, C-15-2526 (Dec. 3, 2015) (Dismissal). For the reasons explained below, we sustain the Dismissal.

**Relevant Legal Authority**

Long-term care facilities must comply with Medicare participation requirements that are set forth at 42 C.F.R. Part 483. "Substantial compliance" means a level of compliance such that "any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. §§ 488.301. State agencies under contract with the Centers for Medicare and Medicaid Services (CMS) perform surveys to assess compliance with the requirements. 42 C.F.R. §§ 488.300, 488.305. A facility found not to be in substantial compliance may be subject to various enforcement remedies, including termination and CMPs. 42 C.F.R. §§ 488.402, 488.406, 488.408. A facility may appeal to an ALJ a finding of noncompliance resulting in imposition of a remedy but may not appeal CMS's choice of which remedy to impose. 42 C.F.R. §§ 498.3(b)(13); 488.408(g); *see also Northlake Nursing & Rehab. Ctr.*, DAB No. 2376, at 5-6 (2011).

An affected party may appoint as its representative anyone not disqualified or suspended from acting as a representative in proceedings before the Secretary or otherwise prohibited by law. 42 C.F.R. § 498.10(a). If the representative appointed is not an attorney, the party must file written notice of the appointment with CMS, the ALJ, or the Departmental Appeals Board. 42 C.F.R. § 498.10(b).

An affected party entitled to hearing, its legal representative, or other authorized official may request a hearing before an ALJ. 42 C.F.R. § 498.40(a).

An ALJ may dismiss a hearing request for cause where the “party requesting a hearing is not a proper party or does not otherwise have a right to a hearing.” 42 C.F.R. § 498.70(b).

Section 1128A(c)(4) of the Act, made applicable to civil money penalty proceedings involving nursing facilities by section 1819(h)(2)(B)(ii) of the Act, provides:

The official conducting a hearing under this section may sanction a person, including any party or attorney, for failing to comply with an order or procedure, failing to defend an action, or other misconduct as would interfere with the speedy, orderly, or fair conduct of the hearing. Such sanction shall reasonably relate to the severity and nature of the failure or misconduct.

Section 1128A(c)(4) of the Act further provides that such sanctions may include prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense, striking pleadings (in whole or in part), staying the proceedings, dismissal of the action, entering a default judgment, ordering the party or attorney to pay attorney's fees and other costs caused by the failure or misconduct, and refusing to consider any motion or other action which is not filed in a timely manner.

“Except for provider or supplier enrollment appeals, the Board may admit evidence into the record in addition to the evidence introduced at the ALJ hearing (or the documents considered by the ALJ if the hearing was waived) if the Board considers that the additional evidence is relevant and material to an issue before it.” 42 C.F.R. § 498.86(a).

### **Background**<sup>1</sup>

In 2014 and 2015, Sunview operated a nursing facility in Texas. A state survey ending February 5, 2015 found that Sunview was not in substantial compliance with certain requirements for nursing home participation in the Medicare and Medicaid programs. CMS Ex. 1, at 3. Based on the survey, CMS terminated Sunview's Medicare and Medicaid provider agreement, and imposed civil money penalties. CMS Ex. 1.

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<sup>1</sup> The factual information in this section, unless otherwise indicated, is drawn from the Dismissal and the record is presented to provide a context for the discussion of the issues raised on appeal.

On May 15, 2015, Samuel Pinter submitted a request for an ALJ hearing on behalf of Sunview via the Departmental Appeals Board's (DAB's) electronic filing system (DAB E-file). Request for Hearing. The request for hearing took the form of a letter, signed by Mr. Pinter, apparently sent from a New York address.<sup>2</sup> *Id.* Included with the request for hearing was a copy of the notice from CMS, dated March 17, 2015, terminating Sunview's Medicare and Medicaid provider agreements, which was addressed to Sunview in Texas.<sup>3</sup> *Id.* The notice informed Sunview, among other things, that Sunview had the right to an ALJ hearing, how to appeal by mail and by DAB E-file, and that "[e]ach representative authorized to represent you must register separately to use the DAB E-File on your behalf." *Id.*

### 1. *The Prehearing Order*

On June 9, 2015, the ALJ issued an Acknowledgment and Prehearing Order (Prehearing Order) setting forth requirements for the parties litigating the appeal, including the requirement to use DAB E-File, unless granted a waiver. Prehearing Order. In a section titled "APPEARANCE," the ALJ noted that "[c]ounsel's or an unrepresented party's signature on the request for hearing constitutes entry of appearance. Counsel or the unrepresented party will provide in the notice of appearance or request for hearing the following information: mailing address, express mail or courier delivery address, telephone number, facsimile number, and email address." *Id.* at 2. The request for hearing did not provide a facsimile number or an e-mail address for Mr. Pinter. *See* Request for Hearing. The Prehearing Order was served on Sunview by DAB E-file. Prehearing Order at 14. Also in the Prehearing Order, the ALJ set out the dates by which the parties must file their briefs, list(s) of any proposed witnesses and exhibits, and copies of the proposed exhibits, as part of a prehearing exchange, and informing the parties that the ALJ may sanction a noncompliant party. *Id.* at 2-3. CMS filed its prehearing exchange on September 8, 2015. Petitioner's prehearing exchange was due within 120 days of the date on which the Prehearing Order was issued, or October 7, 2015. *Id.* at 1, 3. The Prehearing Order also states that the parties were required to file documents electronically, using DAB E-File, unless granted a waiver of the requirement following a written request. *Id.* at 1.

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<sup>2</sup> The letterhead address was "805 Avenue L Brooklyn, NY 11230 718-535-5801". The address did not contain a facsimile number or an e-mail address.

<sup>3</sup> CMS's letter was addressed to "Administrator" and did not mention Mr. Pinter by name.

## 2. *The Order to Show Cause*

On October 15, 2015, the ALJ issued an Order to Show Cause, stating that, although the deadline for filing Petitioner's prehearing exchange had passed, none had been filed. The ALJ ordered Petitioner to show cause, by October 30, 2015, why Petitioner's request for hearing should not be dismissed as abandoned pursuant to 42 C.F.R. § 498.69<sup>4</sup> or as a sanction under section 1128A(c)(4) of the Social Security Act for failure to comply with the Prehearing Order. The ALJ ordered Petitioner to include Petitioner's prehearing exchange materials along with its response to the Order to Show Cause if Petitioner intended to go forward with its request for hearing; otherwise, Petitioner should submit a written request to withdraw the request for hearing. *Id.* Finally, the ALJ stated that failure to timely respond to the Order to Show Cause "will result in dismissal of the request for hearing." *Id.*

## 3. *CMS's and Petitioner's Requests for Extension of Time*

On November 4, 2015, CMS filed a Motion for Extension of Time. In its Motion, CMS stated that Petitioner had failed to meet the deadline for filing Petitioner's prehearing exchange and that Petitioner had not responded to the Order to Show Cause. CMS Motion for Extension of Time, at 1. Consequently, CMS explained, on October 21, 2015 CMS counsel spoke with a person CMS describes as "Petitioner's owner" about submissions which were due on November 6, 2015. In another conversation on November 4, 2015, CMS stated, Petitioner told CMS counsel that Petitioner had not received the Show Cause Order or CMS's prehearing exchange. CMS counsel therefore sent Petitioner its proposed joint filings, the Prehearing Order, the Show Cause Order, and CMS's witness and exhibit lists via fax on November 4, 2015. *Id.* CMS counsel also stated that CMS was also going to send its prehearing exchange to Petitioner by mail. *Id.* CMS requested an extension, of not more than 30 days from such date as Petitioner filed its prehearing exchange, in order to file other reports and statements required by the Prehearing Order.<sup>5</sup> *Id.* at 2.

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<sup>4</sup> § 498.69 Dismissal for abandonment.

- (a) The ALJ may dismiss a request for hearing if it is abandoned by the party that requested it.
- (b) The ALJ may consider a request for hearing to be abandoned if the party or its representative—
  - (1) Fails to appear at the prehearing conference or hearing without having previously shown good cause for not appearing; and
  - (2) Fails to respond, within 10 days after the ALJ sends a "show cause" notice, with a showing of good cause.

<sup>5</sup> This included the Joint Settlement Status Report, Evidentiary Objections, Summary Judgment, Joint Stipulation of Fact, Joint statement of Issues Presented, and prehearing briefs. These submissions are not material to our review of the ALJ's Dismissal in this case.

Also on November 4, 2015, Mr. Pinter wrote a one-page letter to the ALJ's staff attorney in which he indicated that he had spoken to the ALJ's staff attorney about an "adjournment"<sup>6</sup> of the deadline by which to respond to the Order to Show Cause. In his letter, Mr. Pinter stated:

Pursuant to our telephone convers[at]ion of today, we respectfully request an adjournment until November 25<sup>th</sup> 2015 to answer the order [to] show cause for the following reasons:

1. I'm am (sic) computer illiterate and up until this date I have not received that order, furthermore I have spoken to [J.M.], coun[sel] for the US Health and Human Services attorney of this adjournment and she agrees to the date of adjournment.

In addition I respectfully request the waiver to send all and any future data to my fax at 718-338-1019 or via US mail to the above address.

#### *4. The Order to File Designation of Representation and to Show Cause*

On November 5, 2015, the ALJ issued an Order to File Designation of Representation and to Show Cause. In the order, the ALJ raises concerns about Mr. Pinter's right to request an ALJ hearing, or to represent Sunview in its request for an ALJ hearing; about Mr. Pinter's failure to respond to the Order to Show Cause; and about Sunview's intent to move forward with the request for hearing. The entire text of the ALJ's Order to File Designation of Representation and to Show Cause is as follows:

On May 15, 2015, Samuel Pinter, filed a request for hearing, purportedly on behalf of Sunview Care & Rehab Center, LLC. (Sunview), using the Departmental Appeals Board Electronic Filing System (DAB E-File). Samuel Pinter, or someone using his name, registered to use DAB E-File with the address 805 Avenue L, Brooklyn, New York 11230. The request for hearing filed by DAB E-File on May 15, 2015, bears the address 805 Avenue L, Brooklyn, New York. Filed with the request for hearing was a notice from the Centers for Medicare & Medicaid Services (CMS) dated March 17, 2015, terminating the Medicare and Medicaid Provider Agreements of Sunview, which was located at 903 Leahy Street, San Antonio, Texas. The March 17, 2015 CMS notice to Sunview indicates that Sunview may have the right to a hearing before an administrative law judge (ALJ). But no documents have been filed by Samuel Pinter that indicate that he personally has a right to request a hearing or that he has any

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<sup>6</sup> Given the context of his letter, as well as the ALJ's response to his request, we understand Mr. Pinter's use of the word "adjournment" to mean "extension," or its equivalent.

authority to request a hearing on behalf of Sunview. Pursuant to 42 C.F.R. § 498.10(b), only an aggrieved party personally or a properly appointed attorney or representative of an aggrieved party may file a request for hearing or represent the aggrieved party in proceedings before an ALJ. **Not later than November 25, 2015**, Samuel Pinter will file a written and signed appointment of representative as required by 42 C.F.R. § 498.10(b) appointing him representative for Sunview or otherwise show cause why this case should not be dismissed pursuant to 42 C.F.R. § 498.70(b).

On October 15, 2015, an Order to Show Cause was served on the parties by DAB E-File. Petitioner was to show cause not later than October 30, 2015, why this case should not be dismissed for abandonment pursuant to 42 C.F.R. § 498.69 or as a sanction pursuant to section 1128A(c)(4) of the Social Security Act for failure to comply with the Acknowledgment and Prehearing Order dated June 8, 2015 (Prehearing Order). Petitioner failed to timely respond.

On November 4, 2015, my staff contacted Samuel Pinter at my direction to inquire about the status of this case. Samuel Pinter conceded that he did not file the request for hearing and that his secretary registered to use DAB E-File in his name. He admitted that he and his secretary were not monitoring DAB E-File and actively pursuing this case. Samuel Pinter requested until November 25, 2015 to respond to the Order to Show Cause representing that he had spoken with counsel for CMS who does not object to this request for extension. Samuel Pinter's request is granted. **Not later than November 25, 2015**, Petitioner, through its properly appointed representative, will file a response to the Order to Show Cause and file its exchange and pleadings as required by the Prehearing Order.

**Failure to comply with this Order in any respect will cause me to dismiss this case as a sanction without further notice to Petitioner or Samuel Pinter.**

Samuel Pinter also requested a waiver of the requirement to use DAB E-File. The request is **denied**. Samuel Pinter or his secretary used DAB E-File to file the request for hearing and good cause has not been shown for a waiver of that requirement.

A copy of this Order will be served upon Samuel Pinter by mail. Other documents previously served on the parties by DAB E-File remain available to Samuel Pinter and his secretary on that site.

All further proceedings set in my June 9, 2015 Acknowledgment and Prehearing Order are stayed until **November 25, 2015**. If at that time this case is not dismissed the parties will be advised about further case development.

### **IT IS SO ORDERED**

(Emphasis appears in original.)

#### *5. Petitioner's Response to the Order to Show Cause*

On November 18, 2015, Petitioner submitted its Response to Order to Show Cause.<sup>7</sup> In its Response, Petitioner failed to provide a written Appointment of Representative, as ordered by the ALJ, but instead argued the merits of the state survey agency's findings. *Id.*

#### **The ALJ's Dismissal**

On December 3, 2015, the ALJ dismissed the request for hearing, citing 42 C.F.R. § 498.70, and reasoning as follows:

On November 5, 2015, I issued an order for Samuel Pinter to file a written and signed appointment of representative as required by 42 C.F.R. § 498.10(b) appointing him representative for Sunview by November 25, 2015 or otherwise show cause why this case should not be dismissed pursuant to 42 C.F.R. § 498.70(b). Also on November 5, 2015, I issued an order for Petitioner to show cause not later than November 25, 2015, why its request for hearing should not be dismissed for abandonment because Petitioner failed to file its prehearing exchange in response to CMS's motion for summary judgment as directed. Mr. Pinter filed a response to my order to show cause, which may be construed as Sunview's prehearing exchange, but did not file a written and signed appointment of representative as required by 42 C.F.R. § 498.10(b) appointing him representative for Sunview. In my November 5, 2015 Order, I informed Mr. Pinter that failure to comply with my Order in any respect will cause me to dismiss this case as a sanction without further notice to Petitioner or

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<sup>7</sup> We need not determine whether Petitioner's Response to Order to Show Cause was made to the ALJ's Order to Show Cause issued on October 15, 2015, or to the Order to File Designation of Representation and to Show Cause issued November 5, 2015, because it is not material to our analysis.

Samuel Pinter. Absent a written and signed appointment of representative for Sunview, I cannot conclude Mr. Pinter personally has a right to request a hearing or that he has any authority to request a hearing on behalf of Sunview.

*Pursuant to 42 C.F.R. § 498.70, I may dismiss a hearing request if the party requesting the hearing is not a proper party or does not otherwise have a right to a hearing.*

*Accordingly, I order that this case be dismissed.*

Order of dismissal, at 1-2 (emphasis added). The record does not reflect that Petitioner asked the ALJ to vacate the Dismissal. Petitioner's appeal to the Board followed.

### **Petitioner's Request for Review**

Mr. Pinter, ostensibly on behalf of Sunview, submitted a request for review of the Dismissal (Request for Review). In his Request for Review, Mr. Pinter contends that, in response to the ALJ's Order to Show Cause, he "submitted . . . all supporting documents and evidence presenting his case and reasons for requesting a hearing." Request for Review<sup>8</sup> at 1. Mr. Pinter takes exception to the ALJ's conclusion, in dismissing his request for hearing, that "it is not proven that Mr. Pinter personally has a right to request a hearing on behalf of Sunview Care & Rehab Center, LLC" and contends that the ALJ's reasoning is "frivolous and based on a minor technicality." *Id.* Mr. Pinter further argues that his right to represent Sunview before the ALJ was demonstrated in correspondence between Sunview and the state survey agency, and between Sunview and CMS. *Id.* at 2. In addition, Mr. Pinter contends, many of the documents he submitted with his response to the order to show cause bear his name on behalf of Sunview. *Id.* at 2. Mr. Pinter supplements his Request for Review with five attachments, all of which, Mr. Pinter contends, prove that Mr. Pinter had the authority to request an ALJ hearing on behalf of

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<sup>8</sup> The two-page Request for Review is not paginated. Where documents are not paginated, we identify the pages by the order in which they appear.



Sunview.<sup>9</sup> Mr. Pinter does not specify what correspondence with the state survey agency supports his argument. Finally, Mr. Pinter admits that he erred “in assuming clarity of the authority of Samuel Pinter on behalf of Sunview.” *Id.* Notwithstanding that error, however, Mr. Pinter argues that “it would be a travesty of justice to dismiss our right for a hearing for such a minor infraction.” *Id.*

### **Standard of Review**

The standard of review for disputed issues of law is whether the ALJ decision is erroneous. The standard of review for disputed issues of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. *See Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider’s Participation in the Medicare and Medicaid Programs (Guidelines)*, available at <http://www.hhs.gov/dab/divisions/appellate/guidelines/prov.html>.

“The standard of review for an ALJ’s exercise of discretion to dismiss a hearing request where such dismissal is committed by regulation to the discretion of the ALJ is whether the discretion has been abused.” *St. George Health Care Ctr.*, DAB No. 2645, at 3 (2015), *citing High Tech Home Health, Inc.*, DAB No. 2105, at 7-8 (2007), *aff’d, High Tech Home Health, Inc. v. Leavitt*, Civ. No. 0780940 (S.D. Fla. Aug. 15, 2008). Under an “abuse of discretion” standard, “the reviewer may not simply substitute his or her judgment for that of the person exercising discretion.” *Vincent Baratta, M.D.*, DAB 1172, at 9 n.5 (1990). Instead, the reviewing body – here the Board – will consider only whether the decision maker has articulated a reasonable basis for the decision under review, not whether it was the only reasonable decision. *River East Econ. Revitalization Corp.*, DAB No. 2087, at 9 (2007) (in applying an abuse of discretion standard, the Board “will not substitute our judgment” for that of the agency rendering the challenged decision and will instead ask “only whether the agency has articulated a reasonable basis for its decision, not whether it was the only reasonable decision”).

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<sup>9</sup> Mr. Pinter lists the attachments to his Request for Review as follows:

- 1) Certificate of Account Status from Texas Comptroller of Public Accounts for Sunview Care & Rehab Center, LLC. See 2<sup>nd</sup> page where it states officer and Director as Sidney Pinter.
- 2) Filed Corporate document from Secretary of State which lists Samuel Pinter as Organizer.
- 3) Operating Agreement for Sunview Care & Rehab Center, LLC. See signature page showing Sidney Pinter as 100% member.
- 4) Yearly application for license renewal submitted to DADS, signed by Samuel Pinter on behalf of Sunview Care & Rehab Center, LLC.
- 5) Affidavit signed and notarized by Samuel Pinter, stating Sidney and Samuel are one and the same.

These exhibits constitute new evidence introduced for the first time in this matter before the Board. We address the admissibility of this new evidence later in the decision.

## Discussion

In this case we consider whether the ALJ erred or abused his discretion in dismissing the appeal, pursuant to 42 C.F.R. § 498.70(b), on the grounds that Petitioner failed to comply with the regulation at 42 C.F.R. § 498.10(b). Petitioner's contentions may be summarized this way: 1) the ALJ abused his discretion in dismissing the request for hearing; 2) the Board should reverse the dismissal on the equitable ground that it was unfair for the ALJ to dismiss the request for hearing for the reason given; 3) substantial evidence in the record did not support the ALJ's dismissal because Mr. Pinter's authority to act on behalf of Sunview was clear; and 4) additional evidence establishes Mr. Pinter's authority to represent Sunview before the ALJ.

For the reasons set forth below, we find that the ALJ's Dismissal was based upon substantial evidence in the record and free of legal error, and that the ALJ did not abuse his discretion when he dismissed the request for hearing. Therefore, we sustain the Dismissal. Below we address each of Petitioner's arguments in turn.

1. *The ALJ did not abuse his discretion in dismissing the request for hearing.*

Petitioner argues that the ALJ's basis for dismissing the request for hearing – Petitioner's failure to submit an appointment of representative – is “frivolous and based upon a minor technicality.” Request for Review at 1. We disagree. The ALJ applied the regulations requiring Sunview to designate Mr. Pinter its representative (42 C.F.R. § 498.10(b)) and permitting the ALJ to dismiss the request for hearing if the Petitioner either did not have the right to an ALJ hearing or was not the proper party to invoke the right to appeal (42 C.F.R. § 498.70(b)). Although Petitioner considers the regulations unimportant and too technical, Petitioner does not argue that the regulations do not apply in this case or otherwise are invalid.

The Board and the ALJs are bound by the applicable statute and regulations. *Pepper Hill Nursing & Rehab. Ctr., LLC*, DAB No. 2395 at 11, (2011) *citing 1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009) (stating “[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground”); *see also Sentinel Med. Labs., Inc.*, DAB No. 1762, at 9 (2001), *aff'd sub nom. Teitelbaum v. Health Care Fin. Admin.*, 32 F. App'x 865 (9<sup>th</sup> Cir. 2002). Here, the ALJ followed the applicable statute and regulations and articulated a reasonable basis for dismissing Petitioner's request for hearing. CMS took the termination action against Sunview, not against Mr. Pinter, and it is undisputed that Sunview had not named legal counsel to represent it. *See* Request for Hearing. In addition, Sunview, a corporation (*see* CMS Exs. 1-6 (CMS notice letters, state surveys and notice of license suspension and

emergency closure notice addressed to “Sunview Care & Rehab Center, LLC”)), had not appointed a non-lawyer representative despite the regulation requiring appointment of a representative and in disregard of the ALJ’s Order to Designate Representative and to Show Cause.

The regulation at 42 C.F.R. § 498.10(b) (emphasis added) states “[i]f the representative appointed is not an attorney, the party *must* file written notice of the appointment with CMS, the ALJ, or the Departmental Appeals Board.” Accordingly, in his Prehearing Order, the ALJ ordered Sunview, as a party not represented by counsel, to provide a notice of appearance of its designated representative and “to provide in the notice of appearance or request for hearing the following information: mailing address, express mail or courier delivery address, telephone number, facsimile number, and e-mail address.” Prehearing Order at 2. Sunview’s Request for Hearing omitted Mr. Pinter’s e-mail address and facsimile number (*See* Request for Hearing), and Sunview had not submitted any other notice of the appearance of a representative. Because Mr. Pinter, and not designated legal counsel, filed the request for hearing, it was mandatory that Sunview submit an appointment of representative if it intended to be represented by Mr. Pinter. Although Petitioner ignored this requirement, the ALJ was legally correct to apply it.

This Board has been reluctant to permit dismissal and loss of hearing rights where an ALJ has not provided clear directive or provided sufficient opportunities to explain or cure noncompliance. *See, e.g., Chateau Nursing & Rehab. Ctr.*, DAB No. 2427, at 8-11 (2011) (circumstances of petitioner’s failure to respond to order requiring appearance of substitute counsel following counsel of record’s withdrawal did not warrant dismissal under Act section 1128A(c)(4)). However, “[a]s the Board stated in *Guardian Care Nursing & Rehab. Ctr.*, DAB No. 2260, at 21 (2009), we have [an] “overarching responsibility to ensure the efficiency and integrity of proceedings before the Departmental Appeals Board as a whole, which encompasses a concern that the orders of ALJs not be disregarded [. . .] without consequence.” *Meridian Nursing & Rehab at Shrewsbury*, DAB No. 2504, at 12 (2013), *aff’d*, *Meridian Nursing & Rehab at Shrewsbury v. Ctrs. for Medicare & Medicaid Servs.*, 555 F. App’x 177 (3<sup>rd</sup> Cir. 2014).

In this case, the ALJ issued three orders, including two orders to show cause, clearly explaining what was required of Petitioner and the possible consequences for failure to comply. The ALJ also provided Petitioner ample opportunity to comply with his orders, including extensions of time. Moreover, Petitioner’s failure to comply with the ALJ’s orders to submit an appointment of representative was willful. Petitioner never argued that he did not understand the ALJ’s orders or that he could not comply with them. Rather, Petitioner contends that other documents in the record sufficiently established Mr. Pinter’s designation as Sunview’s representative before the ALJ. However, Mr. Pinter’s mistaken assumption that his designation as Sunview’s representative was clear does not show an abuse of discretion on the part of the ALJ. Thus, Petitioner’s argument provides no basis for the Board to reverse the Dismissal.

2. *The Board may not reverse the ALJ's Dismissal on equitable grounds.*

Petitioner argues that the Dismissal was unjust, stating “[I]t would be a travesty of justice to dismiss our right for a hearing for such a minor infraction.” Request for Review at 2. Petitioner makes what is, at its essence, an argument for equitable relief. However, the Board has consistently held that neither it nor the ALJs have the authority to provide equitable relief. *See, e.g., Pepper Hill Nursing & Rehab. Ctr., LLC* at 11 (holding that the ALJ and Board were not authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements); *US Ultrasound*, DAB No. 2302, at 8 (2010) (“Neither the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.”); *id.* at 1, 8 (ALJ properly concluded he had no authority to grant request for equitable relief related to cases of IDTF services provided by entity not enrolled as an IDTF supplier).

Even if the Board could grant equitable relief, we find no unfairness in the ALJ’s Dismissal. It is undisputed that Petitioner never submitted an appointment of representative to the ALJ. Although Petitioner twice failed timely to respond to the ALJ’s orders, the ALJ provided Petitioner opportunities to comply with his orders after the deadlines had passed, including where Petitioner had failed to file a motion for an extension of time, as required. First Petitioner failed to satisfy the “appearance” requirement and failed timely to provide CMS its prehearing exchange as required under the Prehearing Order. *See* Prehearing Order at 2-3. Petitioner also failed to respond timely to the Order to Show Cause. Following requests for extensions from both Petitioner and CMS, the ALJ issued the Order to File Designation of Representation and to Show Cause. In that order, the ALJ observed that, up to that time, Petitioner still had not submitted an appointment of representative.<sup>10</sup> *See* Order to File Designation of Representation and to Show Cause at 1. The ALJ further noted that “only an aggrieved party personally or a properly appointed attorney or representative of an aggrieved party may file a request for hearing or represent the aggrieved party in proceedings before an ALJ.” *Id.* at 1. The ALJ reasoned that, although “Sunview may have the right to a hearing before the Administrative Law Judge (ALJ) [ . . . ] no documents have been filed by Samuel Pinter that indicate that he personally has a right to request a hearing or that he has any authority to request a hearing on behalf of Sunview.” *Id.* Therefore, the ALJ ordered Mr. Pinter to “file a written and signed appointment of representative as required by 42 C.F.R. § 498.10(b) appointing him representative for Sunview or otherwise show cause why this case should not be dismissed pursuant to 42 C.F.R. § 498.70(b)” and

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<sup>10</sup> The ALJ also noted the discrepancy between Sunview’s Texas and New York addresses, which appears to have served as a reminder to the ALJ that Petitioner had not complied with the regulatory requirement for the appointment of a representative.

notified him of the possibility of sanctions if he did not comply. *Id.* at 1, 2. Those possible sanctions included dismissal or an appropriate sanction pursuant to section 1128A(c)(4) of the Act. *Id.* at 2. This was a clear, unambiguous order rooted in a specific provision of the applicable regulations, following an earlier order to show cause which Petitioner failed to answer. Yet, after the ALJ gave the parties an extension to November 25, 2015 for Petitioner to comply with the ALJ's orders, Petitioner again failed to file an appointment of representative. *See* Dismissal at 2. Instead, Petitioner filed only what the ALJ construed as Petitioner's prehearing exchange without responding in substance to the Order to Show Cause. *Id.* Moreover, Petitioner admits that it "*assum[ed]* clarity of the authority of Samuel Pinter on behalf of Sunview" instead of submitting an appointment of representative, as ordered and as required under the regulations. *See* Request for Review at 2.

3. *The documents submitted by Petitioner do not constitute the required appointment of representative or otherwise show his authority to act on Sunview's behalf.*

Petitioner contends that "many of the documents submitted in [its] response to show cause bear[] Samuel Pinter's name in regards to Sunview Care & Rehab Center, LLC." Request for Review at 2. By this argument, Petitioner seems to imply that there is enough evidence in the record other than an appointment of representative that satisfied the regulatory requirement as well as the ALJ's orders that Sunview document Mr. Pinter's authority to act on Sunview's behalf. However, this argument has no merit since the regulations and the ALJ's show cause order expressly require an appointment of representative.

Moreover, none of the exhibits submitted by Mr. Pinter showed his authority to act on Sunview's behalf. Along with the Response to Order to Show Cause, Petitioner submitted three exhibits, labeled Exhibits A, B and C. Exhibit A is a document titled "Survey/Inspection Summary Report" relating to "Sunview Care & Rehab Center L[LC]" in San Antonio, Texas, in which the name Samuel Pinter does not appear. Exhibit B is a bid proposal and pair of work orders for fire protection at Sunview in San Antonio, Texas. Mr. Pinter's name appears in a space marked "Bill To:" on the work order dated 2/6/2015. On that work order, a telephone number is listed in the space marked "contact" and in the space marked "telephone" the name "Mike" appears. The 2/6/2015 work order was signed by "Mike Hernandez." On the work order dated 2/5/15, what appears to be the name "Tanya Gronata" is listed as "contact," and the telephone number is the same as the one on the 2/6/15 work order. In the space marked "Bill To" the words "same as above" appear. The signature on the 2/5/15 work order appears to be that of "Charma Jelton." Mr. Pinter's name does not appear on the 2/5/15 work order. Thus, among multiple listed contacts on the work orders, Mr. Pinter's name appears only once. That is not even sufficient evidence that Mr. Pinter was Sunview's representative on the

work orders much less evidence that Sunview authorized Mr. Pinter to represent it before the ALJ. Exhibit C is a set of copies of checks issued by Sunview Care & Rehab Center in San Antonio, Texas, drawn on Wells Fargo Bank in San Antonio, payable to an individual whose initials are “A.C.,” and bearing an illegible signature in the space for the “authorized signature.” Mr. Pinter’s name does not appear on the checks or on what appear to be a memorandum and spreadsheets listing some of the checks included in the exhibit. None of these exhibits is a written and signed appointment of representative, nor do these exhibits, either individually or in the aggregate, satisfy the regulatory requirement for the appointment of a representative even if not identified as such.

4. *Petitioner’s new evidence is excluded from this appeal because it is not relevant and because Petitioner has not shown good cause for not providing the evidence to the ALJ.*

The applicable regulations establish that the Board may, but need not, accept new evidence in provider participation appeals. The regulation at 42 C.F.R. § 498.86(a) provides: “Except for provider or supplier enrollment appeals, the Board may admit evidence into the record in addition to the evidence introduced at the ALJ hearing (or the documents considered by the ALJ if the hearing was waived) if the Board considers that the additional evidence is relevant and material to an issue before it.” Thus, the regulations authorize, but do not require, the Board to admit additional evidence that the Board finds relevant and material. Consistent with the regulations, the applicable guidelines permit the introduction of relevant, material new evidence in provider participation cases where the party offering the new evidence can show good cause for not introducing the evidence before the ALJ. *See Guidelines, Development of the Record on Appeal*, paragraph (g) (stating “While the Board may admit additional evidence into the record (during oral proceedings or through written submission) after notice to the parties, the Board will do so only if it considers the additional evidence to be relevant and material to the issue before it. In deciding whether to admit evidence, the Board will also consider whether the party that proffers the evidence has demonstrated good cause for not producing the evidence during proceedings before the ALJ.”).

As listed above, Petitioner’s new evidence consists of several documents purporting to establish Mr. Pinter as the “organizer,” owner (“100% member”) and “director” of Sunview. *See* note 9, above. The Certificate of Account Status from the State of Texas is dated November 20, 2006. The Certificate of Correction issued by the Texas Secretary of State, Corporations Section is dated May 3, 2006. The operating agreement for Sunview Care & Rehab Center LLC bears no date and is signed by “Sidney V. Pinter.” The license renewal notice from the Texas Department of Aging and Disability Services addressed to Sunview in Brooklyn, New York (salutation: “Dear Owner:”), is dated February 1, 2013. Petitioner has not argued to the Board that these documents were

unavailable to Petitioner when Petitioner responded to the ALJ's Show Cause Order or at any other time prior to the issuance of the Dismissal. In addition, the Certificate of Account Status and operating agreement identify a "Sidney V. Pinter," not a "Samuel Pinter" as the officer and Director and "100% member," respectively. In an apparent effort to clarify this discrepancy, Samuel Pinter submits to the Board a sworn, notarized affidavit, dated December 15, 2015, in which he states, in sum, that his legal name is Sidney Pinter, that his Hebrew name is Samuel Pinter. This affidavit was not completed until after the ALJ's Dismissal on December 3, 2015, and Petitioner fails to argue or show that he could not have produced such an affidavit prior to that date.

In the request for review, rather than argue good cause for not providing these records to the ALJ, Mr. Pinter acknowledges his error in not submitting proof that he was the authorized representative of Sunview. Petitioner states: "[P]erhaps we were erroneous in assuming clarity of the authority of Samuel Pinter on behalf of Sunview." Request for Review at 2. Petitioner's erroneous assumption is, in effect, an admission to non-compliance with the ALJ's order and does not constitute good cause for not submitting this evidence to the ALJ. Accordingly, we exclude Petitioner's new evidence on this ground, and have no need to consider either their relevance or materiality.

In addition to these exhibits, Petitioner included four more exhibits along with its "Appellant's [Petitioner's] Response to CMS[s] Response [to the] Request for Review," (Petitioner's Response to CMS) which consist of A) a 2006 letter of good standing from the comptroller of the state of Texas, along with a copy of Sunview's operating agreement; B) a January 25, 2016 affidavit appointing Mr. Pinter representative for Sunview; C) a September 12, 2015 order from the presiding ALJ in proceedings before the Texas State Office of Administrative Hearings; and D) Petitioner's undated "Closing Brief" to the Texas State Office of Administrative Hearings. Exhibits A, C, and D to Petitioner's Response are not relevant to the ALJ's Dismissal because they are not the appointment of a representative required by the regulation. Petitioner has made no case that this regulatory requirement could be met by a competent substitute or that these documents would qualify as such. Moreover, Petitioner does not show good cause why these documents were not submitted to the ALJ. Therefore, we exclude them from the record.

Exhibit B to Petitioner's Response to CMS's Response is an appointment of representative in the form of an affidavit generated nearly three months after the ALJ issued the Order to File Designation of Representation and to Show Cause. Petitioner contends that his status as a *pro se* litigant left him unaware of the requirement to submit an appointment of representative. See Petitioner's Response to CMS at 1 ("Perhaps, as Sidney a/k/a Samuel Pinter is filing an appeal *Pro Se*, he was not aware that a separate document with written notice of representation needed to be submitted, and this this document is submitted hereto. (attached as Exhibit B)."). However, Mr. Pinter never

before argued a lack of notice of the requirement; he argued that he had provided sufficient information to document his clear authority to represent Sunview but not that he was unaware of the requirement to do so. *See* Request for Review. In addition, Petitioner argued that the requirement was “frivolous” and a “minor technicality” but not that he did not know of the requirement. *Id.* Rather than show cause why he did not submit the appointment of representative as ordered, Mr. Pinter demurred, conceding that he erred in assuming his authority was already made clear to the ALJ. Accordingly, we reject Petitioner’s assertion that he did not know Sunview was required to submit a written appointment of representative, and exclude this exhibit.

### **Conclusion**

Based on the foregoing reasons, the Board sustains the Dismissal. The Dismissal is binding. 42 C.F.R. § 498.71(b) (“The dismissal of a request for hearing is binding unless it is vacated by the ALJ or the Departmental Appeals Board.”).

\_\_\_\_\_/s/  
Sheila Ann Hegy

\_\_\_\_\_/s/  
Constance B. Tobias

\_\_\_\_\_/s/  
Christopher S. Randolph  
Presiding Board Member