

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:)	DATE: July 2, 2010
Experts Are Us, Inc.,)	
)	
Petitioner,)	Civil Remedies No. CR2047
)	App. Div. Docket No. A-10-38
)	
)	Decision No. 2322
- v. -)	
)	
Centers for Medicare &)	
Medicaid Services.)	

REMAND OF
ADMINISTRATIVE LAW JUDGE DECISION

Experts Are Us, Inc. (Experts) appealed a decision by Administrative Law Judge (ALJ) Carolyn Cozad Hughes dated December 18, 2009 granting a Motion to Dismiss filed by the Centers for Medicare & Medicaid Services (CMS). Experts Are Us, Inc., DAB CR2047 (2009) (ALJ Decision). The ALJ concluded that Experts had failed to identify a determination for which it had a right to a hearing in this forum under the Social Security Act (Act) or 42 C.F.R. Part 498.

In the proceeding before the Board, CMS conceded that Experts has identified three determinations that were subject to ALJ review under section 1866(j)(2) of the Act and 42 C.F.R. Part 498. CMS conceded that those determinations, dated August 1, 2007, December 11, 2007 and May 30, 2008, were CMS contractor

denials of reenrollment applications submitted by Experts.¹ Accordingly, we reverse the ALJ Decision in part and remand the case for further proceedings consistent with this decision.

Standard of review

The standard of review on factual issues is whether the ALJ decision is supported by substantial evidence in the whole record. The standard of review on issues of law is whether the ALJ decision is erroneous. See Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program at <http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html>

Relevant legal authority

In 2003, Congress enacted section 1866(j) of the Act. Section 1866(j)(1), directs the Secretary to adopt a regulatory process for Medicare enrollment. Section 1866(j)(2) provides –

A provider of services or supplier whose application to enroll (or, if applicable, to renew enrollment) under this title is denied may have a hearing and judicial review of such denial under the procedures that apply under subsection (h)(1)(A) to a provider of services that is dissatisfied with a determination by the Secretary.

Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003, Pub. L. No. 108-173, § 936(a)(2).

In enacting section 1866(j), Congress stated that these hearing rights would apply to "denials on or after such date (not later than 1 year after the date of the enactment of this Act [December 8, 2003]) as the Secretary specifies." MMA

¹ The August 1, 2007, December 11, 2007 and May 30, 2008 letters at issue here are found at Petitioner Exhibits 7 and 11, page 1 (which are attached to the ALJ Decision) and Petitioner Exhibit 36(9) (which is attached to a submission received from Experts on September 15, 2009).

Unless otherwise noted, all references to Petitioner Exhibits are to those exhibits marked and attached to the ALJ Decision by the ALJ.

§ 936(b)(3). On January 14, 2005, CMS issued a transmittal stating that only denials or revocations with a decision date of December 8, 2004, or later, would be reviewable by an ALJ.² CMS Ex. 2 (Transmittal 95 revising Chapter 10, § 19 of the Medicare Program Integrity Manual (MPIM) at <http://www.cms.gov/Transmittals/Downloads/R95PI.pdf>). In that transmittal, CMS also described procedures for suppliers of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS suppliers), such as Experts, to first request a contractor hearing and, thereafter, to request "an ALJ hearing [that would follow] procedures found at 42 C.F.R. Part 498, Subpart D - Hearings" by the ALJs with the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB).³ Id. at 19.D; see also Transmittal 151 (July 14, 2006) at <http://www.cms.gov/Transmittals/Downloads/R275PI.pdf>; and MPIM Chapter 10, Section 19.

The hearing procedures under 42 C.F.R. Part 498, subparts D and E, apply to a provider of services under subsection 1866(h)(1)(A) of the Act and provide for ALJ, Board and judicial review of CMS "initial determinations." 42 C.F.R. §§ 498.1(a); 498.3. In a 2006 rulemaking, the Secretary amended Part 498 and added a new provision to the list of CMS determinations that are considered initial determinations for purposes of Part 498. 71 Fed. Reg. 20,781 (April 21, 2006). That provision, section 498.3(b)(17), was revised in a later technical amendment, to provide that "whether to deny or revoke a provider's or supplier's Medicare enrollment in accordance with § 424.530 or § 424.535" is an initial determination. 71 Fed. Reg. 37,505 (June 30, 2006). While there arguably remained some ambiguity as to whether the regulatory amendment covered DMEPOS suppliers, regulatory changes in 2008 clarified that section 498.3(b)(17) applies to DMEPOS suppliers and that ALJ and Board review of denials of DMEPOS supplier applications are otherwise governed by Part 498. See 73 Fed. Reg. 36,448 (June 27, 2008). In any event, there is no dispute that as of December 8, 2004 DMEPOS suppliers had a statutory right to an ALJ hearing and Board review under section 1866(j)(2).

² CMS stated in this transmittal that it construed section 1866(j)(2) to apply to revocations of enrollment as well as to denials of an application to enroll.

³ The CRD provides staff support for the ALJs assigned to the DAB who conduct hearings in the 42 C.F.R. Part 498 appeals.

The Secretary also implemented section 1866(j) by adopting 42 C.F.R. Part 424, subpart P. Section 424.530 allows CMS to deny enrollment on one of multiple grounds including noncompliance with Medicare enrollment requirements and not being operational. Section 424.545(a) as amended in 2008 provides that a "prospective . . . supplier that is denied enrollment in the Medicare program . . . may appeal CMS's decision in accordance with [42 C.F.R.] part 498, subpart A of this chapter."

Section 424.525(a) (2006) allowed CMS to reject a supplier's enrollment application if the supplier "fails to furnish complete information on the provider/supplier enrollment application within 60 calendar days from the date of the contractor request for the missing information" or "fails to furnish all required supporting documentation within 60 calendar days of submitting the enrollment application." (The 2008 amendment to section 424.525 reduced this time period to 30 calendar days. 73 Fed. Reg. 36,461 (June 27, 2008).) Section 424.525(d) (2006 or 2008) provided and provides that rejected enrollment applications "are not afforded appeal rights."

Background

The following facts from the ALJ Decision and the record are undisputed.

Experts was a Medicare DMEPOS supplier. On December 22, 2003, the responsible CMS contractor, Palmetto GBA National Supplier Clearinghouse (NSC), notified Experts that it was revoking Experts' Medicare supplier number for noncompliance with DMEPOS standards. CMS Ex. 1. CMS asserted, and Experts did not dispute, that that revocation became "administratively final" 90 days after Experts failed to request a NSC fair hearing in response to NSC's letter of March 30, 2004 denying Experts' request for reinstatement. CMS Response before ALJ at 2-3; see also CMS Ex. 1; P. Ex. 3; P. Ex. 19(J) attached to submission received September 15, 2009.

Between 2005 and 2008, Experts repeatedly sought to reenroll in the Medicare program by filing a CMS 855S form, which is titled "Medicare Enrollment Application - Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Suppliers."⁴ P.

⁴ Experts alleges that, after the revocation, it repeatedly filed CMS 855S applications with NSC. See, e.g., "Motion for Entry of Order" received by the CRD December 2, 2009, at 18, 25, 30. CMS and NSC periodically referred to these forms as

(Continued. . .)

Ex. 5, at 2. NSC did not approve any of these applications. See, e.g., P. Exs. 5, 7, 11.

In 2009, Experts filed a pro se submission with the CRD. The submission consisted of an index of documents and documents related to the 2003/2004 revocation of its billing privileges, CMS's denial of reimbursement for items allegedly provided to Medicare beneficiaries prior to the revocation, NSC's August 1, 2007, December 11, 2007, and May 30, 2008 dispositions of its DMEPOS reenrollment applications, allegations of contractor fraud and constitutional violations, and CMS's alleged noncompliance with the Freedom of Information Act (FOIA).

The ALJ treated this submission as a hearing request under 42 C.F.R. Part 498. ALJ Decision at 3. While she found that Experts had "fail[ed] to identify the specific determination it challenges" as required by 42 C.F.R. § 498.40(b), she went on to "consider whether I have authority to review any of the determinations found among [Experts'] submissions." *Id.* The ALJ then made findings of fact and conclusions of law (FFCLs) to the effect that -

- She had no authority to review NSC's 2003/2004 revocation of Experts' billing privileges because, at the time of that revocation, a DMEPOS supplier had no statutory or regulatory right to ALJ review of a revocation. *Id.*; FFCL 1.
- She had no authority to review NSC's dispositions of Experts' subsequent "applications for reinstatement" because those determinations constituted refusals to reinstate Experts' billing privileges and such refusals are not initial determinations under part 498. *Id.* at 4; FFCL 2 (emphasis added).

(Continued. . .)

"reactivation application[s]." See, e.g., P. Exs. 5, at 2; 10, 12. CMS affirmed before the Board that the applications Experts filed were CMS 855S reenrollment applications and should not have been referred to as reactivation applications, since Experts' billing privileges had been revoked, not deactivated. CMS Response to Order to Develop the Record (CMS Response to Order) at 3-4.

- She had no authority to review Experts' constitutional claims. Id. at 4.
- Experts' hearing request was not filed within the 60-day filing limit set forth in 42 C.F.R. § 498.40. Id.

The ALJ then dismissed the case on the ground that Experts had no right to a hearing in this forum under the Act or 42 C.F.R. Part 498. Id.

Order to Develop the Record

Experts appealed the ALJ Decision. The Board ordered further development of the record by asking the parties to respond to questions related to (1) how CMS characterizes the action a supplier takes when, after final revocation of its billing privileges, it files a CMS 855S form, (2) whether a supplier seeking to reestablish enrollment by filing a CMS 855S form is entitled to ALJ review if the application is denied, and (3) whether NSC's August 1, 2007, December 11, 2007, and May 30, 2008 dispositions of Experts' applications constituted rejections of the applications under 42 C.F.R. § 424.525 or denials of reenrollment applications under section 424.530.⁵

CMS responded as follows: When a finally revoked supplier files a CMS 855S form, the supplier has filed an application for reenrollment. CMS Response to Order at 1-2, citing 42 C.F.R. § 424.535(c) (2006) (presently found at subsection 424.535(d)); 72 Fed. Reg. 9479, 9485-9486 (March 2, 2007). A supplier is entitled to ALJ and judicial review of a denial of a reenrollment application. Id. at 2-3, citing section 1866(j)(2) of the Act; 42 C.F.R. §§ 498.1(g), 498.3(b)(17), 424.545(a); 72 Fed. Reg. at 9485-9486. The August 1, 2007, December 11, 2007, and May 30, 2008 NSC determinations on Experts' reenrollment applications constituted denials of enrollment under 42 C.F.R. § 424.530 and section 1866(j)(2) of the Act. Id. at 4.

⁵ The Board's Order was limited to the previously cited NSC dispositions of August 1, 2007, December 11, 2007 and May 30, 2008. The reasons for that limitation are that (1) those are disposition letters that Experts submitted with its hearing request and (2) those are the dispositions letters for which NSC made its determinations on failures associated with site inspections, either because the business was allegedly closed when the inspections were attempted or the site inspection allegedly established noncompliance with DMEPOS standards.

Finally, CMS stated that "[a]lthough the ALJ's legal conclusions were correct, these conclusions were based on the initial premise that the NSC's determinations were reinstatement denials" rather than reenrollment denials. Id. at 5. CMS effectively conceded by its answers to the Board's questions that this premise was incorrect and stated that -

a remand to the ALJ may be warranted to determine whether [Experts] was entitled to a hearing based on the various determination letters currently in the record, and any supplemental records produced by CMS and the NSC. If, on remand, the ALJ determines that the prerequisites for a hearing were met, [Experts] could challenge the merits of the determinations identified by the Board or ALJ, as applicable.

Id. at 5.

In its response to the Board's Order, as relevant to this proceeding, Experts asserts that it was entitled to review of NSC's determinations on its applications by the contractor, and, then by an ALJ and the Board; that Experts made timely requests to the contractor for review; and that Experts has good cause for the "seemingly untimely requests" it subsequently made for an ALJ hearing. P. Response to Order at 2.

Analysis

Experts raised numerous objections to the ALJ Decision.⁶ As explained below, the majority of these objections are not grounds for modifying the ALJ Decision. Below we explain why we partially affirm and partially reverse and remand the ALJ Decision and why the remainder of Experts' arguments are without merit.

1. **The ALJ correctly concluded that she had no authority to review the 2003/2004 revocation of Experts' supplier number. FFCL 1.**

⁶ Before the Board, Experts filed an initial Request for Review (RR) on February 2, 2010 ("Notice of Appeal Brief"), additional brief-like submissions on March 16, 2010 ("Motion for Entry of Order and Amended Appeal Brief") and March 23, 2010 ("Motion for Entry of Order Automatic Reversal of ALJ Decision and Appellees Revocation Decision"), and a response to the Board's Order ("Plaintiffs Response to the Defendants Answer to the Appeal Board Order to Develop the Record").

As the ALJ explained, DMEPOS suppliers had no right to ALJ or judicial review of denials of enrollment or revocations of enrollment and billing privileges prior to the enactment of section 1866(j)(2) of the Act. ALJ Decision at 3. As discussed in the ALJ Decision and above, section 1866(j)(2) was effective for denials or revocations with a decision date of December 8, 2004, or later. CMS Ex. 2. The revocation of Experts' supplier number occurred well prior to December 8, 2004 and, therefore, the ALJ correctly concluded that Experts had no right to an ALJ hearing on this revocation.

- 2. The ALJ erred in concluding that the August 1, 2007, December 11, 2007 and May 30, 2008 determinations were denials of "applications for reinstatement" under 42 C.F.R. § 405.874.**

The ALJ determined that the applications Experts filed after the revocation were "applications for reinstatement" and that Experts was seeking review of "denials of . . . applications for reinstatement." ALJ Decision at 4. This determination was error. Suppliers had and have the option of requesting reinstatement in certain circumstances as part of the revocation process by submitting a corrective action plan purporting to promptly remedy the noncompliance which was the basis for the revocation. See 42 C.F.R. § 405.874(f) (2004) (which provided that "[a] billing number may be reinstated after revocation when an entity completes a corrective action plan, to which CMS has agreed"); § 405.874(e) (2008) (which provides that "[i]f a . . . supplier completes a corrective action plan . . . the CMS contractor may reinstate the . . . supplier's billing privileges"), and § 424.535(c) (2006) (which provided for "re-enrollment after revocation . . . through completion and submission of a new applicable enrollment application"). Thus, in 2003 when NSC revoked Experts' supplier number, NSC informed Experts that it could seek reinstatement within 60 days of the notice and "complete a corrective action plan" and that "upon satisfactory completion of a corrective action plan . . . NSC may reinstate your supplier number." CMS Ex. 1, at 2.⁷

⁷ CMS asserts that, on February 28, 2004 in response to the revocation notice, Experts represented to NSC that it had made the necessary corrections and requested reinstatement. Respondent's Reply at 1-2, citing P. Exs. 1, 3; see also CMS Response to Order at 2. Experts' request was denied after a site inspection, which NSC said established that Experts had not made the corrections. P. Ex. 3.

As CMS stated in its response to the Board's Order, however, the actions Experts took in 2007 and 2008 by filing CMS 855S forms after its supplier number was revoked in 2004 were applications for reenrollment, not applications for reinstatement, and the determinations of August 1, 2007, December 11, 2007, and May 30, 2008 were, as CMS now concedes, denials of reenrollment pursuant to section 424.530(a)(1). CMS Response to Order at 1, 4-5. Additionally, CMS conceded that a supplier was entitled to ALJ and judicial review of reenrollment denials under section 1866(j)(2) of the Act and that such review "was appropriate" under 42 C.F.R. § 498.3(b)(17). Id. at 3.

Accordingly, based on CMS's statements in response to the Order, we hold that the August 1, 2007, December 11, 2007 and May 30, 2008 NSC determinations are denials of reenrollment applications under section 425.530 and reviewable under 42 C.F.R. Part 498.⁸ We reverse FFCL 2 and conclude that Experts is entitled to a hearing on these denials unless further development or consideration of the record establishes a basis, consistent with CMS's concessions in response to the Order and this decision, under which Experts would not be entitled to a hearing.⁹ Therefore, we remand the case to the ALJ to consider whether Experts has met the prerequisites for hearing as to these

⁸ We note that the record contains a second determination letter dated December 11, 2007 that the ALJ marked as Petitioner Exhibit 11, page 2. It was addressed to 303 Ulrich (rather than Richmond Avenue as the other December 11 determination) and notified Experts that Experts must file a new CMS 855S because it had failed to timely respond to NSC's request for information for that "application package." Experts represents that it did supply the requested information. See Att. FF to Motion for Entry of Order received by the Board on March 16, 2010 at next to last page. A supplier has no right to an ALJ hearing when an application is rejected for failure to furnish complete information. 42 C.F.R. § 424.525(d). On remand, the ALJ can determine whether the December 11 letter addressed to 303 Ulrich is material to any issue before her.

⁹ We note, for example, that the ALJ Decision contains a brief discussion of the timeliness of Experts' hearing request under 42 C.F.R. § 498.40. ALJ Decision at 4. However, presumably because her decision did not rest on this ground, the ALJ did not fully develop that discussion or consider whether there would be good cause under that section for extending time limits.

denials, and, if she concludes that it has, to conduct a hearing.

3. Experts failed to show that the ALJ committed additional errors.

Experts argues that NSC and CMS violated its constitutional rights and committed fraud (see, e.g., RR at 5, Amended Appeal Br. at 6-7, 9), that CMS owes it reimbursement from previously filed claims (see, e.g., RR at 6), that CMS did not comply with FOIA (see, e.g., Amended Appeal Br. at 5, 9), and that an attorney improperly purported to represent Experts before the ALJ (see, e.g., id. at 1-2, 4). We find none of Experts' arguments grounds for concluding that the ALJ erred and do not include any of these issues in our remand order.

The ALJ ruled that she had no authority to review Experts' constitutional claims. ALJ Decision at 4. The ALJ is correct insofar as "[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground, even a constitutional one." 1866ICPayday.com, L.L.C., DAB No. 2298, at 14 (2009); see also, Sentinel Medical Laboratories, Inc., DAB No. 1762, at 9 (2001) aff'd sub nom., aff'd, Teitelbaum v. Health Care Financing Admin., No. 01-70236 (9th Cir. Mar. 15, 2002), reh'g denied, No. 01-70236 (9th Cir. May 22, 2002). Thus, the ALJ had no authority to review Experts' assertion that the absence of ALJ or judicial review of supplier revocations prior to December 2004 violated Experts' constitutional rights. On the other hand, an ALJ may, "consistent with the applicable regulations and statutes, take steps to ensure procedural fairness" (1866ICPayday.com, DAB No. 2298, at 14) and consider constitutional claims challenging the manner in which a statute or regulation is interpreted or applied in a particular case (Sentinel, DAB No. 1762, at 11-12). To the extent that Experts is arguing that CMS unconstitutionally deprived it of its hearing rights under section 1866(j)(2), the Board has addressed this issue by remanding this case for further proceedings. To the extent that Experts is seeking damages for alleged violations of its constitutional rights or other allegedly fraudulent conduct by NSC or CMS, the ALJ and the Board have no authority to award such relief.¹⁰

¹⁰ In February 2008, the owner of Experts sued Palmetto GBA and CMS, among others, for \$26 million in damages. Lemons v. Palmetto GBA, No. 08-cv-00715 (S.D. Texas). The case was

(Continued. . .)

Before the ALJ and on appeal, Experts seeks to recover reimbursement of \$405,782.19 for items it allegedly provided to Medicare beneficiaries prior to NSC's revocation of its supplier number. See, e.g., Amended Appeal at 10. The appeals process for denials of individual claims for items and services is separate from the administrative process for challenging the denial of a supplier enrollment application. Compare 42 C.F.R. Part 405, subpart H (2003) and subpart I (2005), with Part 498, subpart A and Part 424, subpart P. ALJs in the CRD have no authority to review such claims.

Experts complains that CMS has failed to respond to requests it made under FOIA. RR at 5-6. The ALJ has no authority to enforce FOIA. See 5 U.S.C. § 552(a)(4)(B); 45 C.F.R. § 5.34. Moreover, Experts has not demonstrated that the information it seeks is relevant to the issues that remain in this case.

On appeal, Experts also asserts that the attorney who filed a response to CMS's Motion to Dismiss on its behalf was not authorized to represent Experts and that Experts was unaware that the attorney was purporting to represent it. See, e.g., Amended Appeal Br. at 1, 2-4; Memo of March 23, 2010. It argues the case should, therefore, be reversed. *Id.* Because the case is being remanded and Experts identified no prejudice resulting from the attorney's involvement, we do not address these allegations. Additionally, we note that the ALJ copied Experts with documents that reflected the attorney's participation in the case. See CRD letter of September 30, 2009 to the attorney about her representation of Experts; CRD letter of October 21, 2009 informing the parties that the ALJ had approved the attorney's request for an extension of time to respond to CMS's Motion to Dismiss.

(Continued. . .)

dismissed by the district court, and the dismissal was affirmed on appeal. Lemons v. Palmetto GBA, 2010 WL 444403 (5th Cir. 2010).

Conclusion

For the reasons discussed above, we affirm FFCL 1, reverse FFCL 2, and remand this case to the ALJ for further proceedings consistent with this decision.

/s/

Judith A. Ballard

/s/

Constance B. Tobias

/s/

Shelia A. Hegy
Presiding Board Member