

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

Capital District Behavioral Health Psychologists, PLLC
Docket No. A-18-11
Decision No. 2866
April 20, 2018

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

Capital District Behavioral Health Psychologists, PLLC (Petitioner) appeals a ruling issued by an Administrative Law Judge (ALJ) dismissing Petitioner's request for a hearing. *Capital District Behavioral Health Psychologists, PLLC, Ruling Dismissing Request for Hearing*, ALJ Ruling No. 2017-24 (Sep. 1, 2017) (ALJ Ruling). The ALJ determined that Petitioner did not have a right to a hearing because CMS never issued a reconsidered determination. For the reasons explained below, we affirm the ALJ Ruling.

Legal Background

The determination of a supplier's effective date under 42 C.F.R. § 424.520(d) is an "initial determination" subject to review as provided in Part 498. 42 C.F.R. § 498.3(a)(1), (b)(15); *Victor Alvarez, M.D.*, DAB No. 2325, at 3 (2010). A Medicare supplier may request reconsideration of an initial determination within 60 days from receipt of the initial determination. 42 C.F.R. §§ 498.5(d)(1), 498.22. A supplier dissatisfied with the reconsidered determination may appeal, to an ALJ and then the Board, the reconsidered determination. *Id.* § 498.5(l)(2), (3).

An ALJ may dismiss a hearing request for cause in situations including when the requesting party "is not a proper party or does not otherwise have a right to a hearing." *Id.* § 498.70(b). A party whose hearing request is dismissed by the ALJ may appeal the dismissal order to the Board. *Id.* § 498.80. The ALJ's "dismissal of a request for hearing is binding unless it is vacated by the ALJ or the Departmental Appeals Board." *Id.* § 498.71(b).

Case Background¹

On October 24, 2014, National Government Services (NGS), a CMS contractor, issued a letter notifying Petitioner that it must revalidate its Medicare enrollment information within 60 days from the postmark date of that letter. CMS Ex. 1. On August 29, 2016, NGS received from Petitioner a revalidation application that it was able to process to approval.² CMS Ex. 2. On October 6, 2016, NGS sent Petitioner a letter containing its initial determination to approve Petitioner's application effective July 30, 2016.³ ALJ Decision at 3; CMS Ex. 3. On October 11, 2016, NGS emailed a copy of the October 6, 2016 approval letter containing the initial determination to the contact person listed on Petitioner's enrollment application. ALJ Decision at 3; CMS Ex. 3, at 4. The approval letter informed Petitioner that if it disagreed with the effective date stated in the letter, it must file a request for reconsideration no later than 60 days from the postmark date of the letter.⁴ CMS Ex. 3, at 2.

NGS received Petitioner's request for reconsideration of the revalidation effective date on December 15, 2016. CMS Ex. 4. On January 3, 2017, NGS issued a letter dismissing for untimeliness Petitioner's request for reconsideration. CMS Ex. 5 (Reconsideration Dismissal). The Reconsideration Dismissal stated in relevant part:

Title 42 of the Code of Federal Regulations (CFR), § 498.22, provides for a 60-day time limit from receipt of the notice of the initial determination until a party may request a reconsideration. For the purposes of such time limit, the date of receipt is presumed to be five days after the date on the initial determination letter, unless there is evidence to indicate that the initial determination was received earlier or later. The carrier's provider enrollment specialist had issued his/her decision on 10/06/2016 and had

¹ The factual information in this section is drawn from the ALJ Ruling and the record before the ALJ. Unless we indicate otherwise, the facts stated in this section are undisputed.

² It appears from the record that Petitioner submitted earlier revalidation applications that NGS was not able to process to approval. *See* CMS Ex. 4, at 4-6.

³ Petitioner disputes whether NGS actually mailed the initial determination letter on October 6, 2016, but, as we later explain, the ALJ's decision, and ours, are based on lack of legal authority to review NGS's denial of reconsideration; accordingly, we need not and do not reach any factual disputes relating to whether Petitioner's reconsideration request was untimely.

⁴ CMS asserts that the initial determination, which stated an effective date of July 30, 2016, *see* CMS Ex. 3, at 1, "conflates the 'effective date' of Petitioner's revalidation with its 'retrospective billing date'" and contends that Petitioner's revalidation effective date is actually August 29, 2016, the date NGS received Petitioner's Medicare enrollment application that was processed to approval. *Respondent's Motion in Opposition to Petitioner's Request for Appellate Board Review with Memorandum of Law* at 3, n. 2. Because the sole issue before the Board on appeal is whether the ALJ erred by dismissing Petitioner's request for hearing for jurisdictional reasons, we make no findings or conclusions regarding the proper revalidation effective date of Petitioner's Medicare billing privileges.

advised you by letter of his/her findings. Also, your right to request a reconsideration within 60 days from the date of the presumed receipt of such letter was explained.

Your request for a reconsideration was received in our office on 12/15/2016. This date is more than 60 days from the presumed date of receipt of the provider enrollment specialist's letter. Therefore, your request for a reconsideration in this matter must be dismissed.

Reconsideration Dismissal at 1.

Petitioner filed a request for hearing dated March 1, 2017. Request for Hearing. On June 9, 2017, the ALJ issued an order directing the parties to brief whether he had jurisdiction to hear and decide Petitioner's appeal. On June 28, 2017, CMS filed a motion to dismiss (Motion to Dismiss), arguing that the ALJ "lack[ed] jurisdiction to hear this case as no reconsidered determination was made in this matter." Motion to Dismiss at 2. CMS filed five proposed exhibits with its motion (CMS Exs. 1-5). On August 17, 2017 Petitioner filed a response (Pet. Response) in opposition to CMS's Motion to Dismiss. Petitioner argued that it did not receive the initial determination until October 14, 2017, and that its request for reconsideration, which it mailed on December 13, 2016, was therefore timely. Pet. Response at 2-4. Petitioner also filed three proposed exhibits (Pet. Exs. A-C) and an affidavit signed by one of its partners (Pet. Affidavit).

ALJ Ruling

The ALJ entered the proposed exhibits and affidavit into the record for the purpose of deciding the issue of jurisdiction. ALJ Ruling at 1.⁵ The ALJ then determined that he lacked jurisdiction to hear Petitioner's appeal, writing in relevant part:

Petitioner has no right to a hearing. Under regulations governing hearings in cases involving CMS, a supplier that is dissatisfied with a determination of its effective date of participation may file a request for reconsideration of that determination. Hearing rights emanate from an adverse reconsideration determination. There *must* be a reconsideration determination that is adverse to the supplier in order for the supplier to have hearing rights. Absent such a determination, the supplier has no right to an administrative hearing. 42 C.F.R. § 498.5(1)(2); *Denise A. Hardy, D.P.M.*, DAB No. 2464 at 4-5 (2012); *Hiva Vakil, M.D.*, DAB No. 2460 at 4-5 (2012).

⁵ Petitioner submitted three exhibits with its Request for Review (labeled Exhibits 1-3), and three exhibits with its Reply (labeled Exhibits A-C). These submissions match documents already contained in the record. Accordingly, we make no determination regarding the admissibility of such exhibits.

It is undisputed that the contractor with which Petitioner filed its reconsideration request dismissed that request without addressing the merits of it. CMS Ex. 5. It issued no reconsideration determination. Consequently, and as a matter of law, Petitioner has no right to a hearing and I am without authority to hear and decide this case.

ALJ Ruling at 2. While the ALJ concluded he must dismiss on jurisdictional grounds (the absence of a right to an ALJ hearing and, consequently, the ALJ's lack of authority to hear the appeal), he also stated that, as a matter of fact, he found that "Petitioner received the contractor's notice by no later than October 11" and that "Petitioner did not satisfy its December 10, 2016 deadline for filing a reconsideration request." *Id.* at 3.

Standard of Review

The standard of review for disputed issues of fact is whether the ALJ ruling is supported by substantial evidence on the record as a whole. The standard of review for disputed issues of law is whether the ALJ ruling is erroneous. *Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program (Guidelines)* at <http://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment>.

Discussion

On appeal, Petitioner does not address the basis for the ALJ's dismissal – that the ALJ lacked the authority to hear Petitioner's appeal because NGS did not issue a reconsidered determination. Rather, Petitioner makes several arguments assigning error to the ALJ regarding his findings on the timeliness of Petitioner's request for reconsideration. The ALJ repeatedly made clear throughout his decision, however, that he lacked jurisdiction to hear this case and that NGS's decision to dismiss Petitioner's reconsideration request "is non-reviewable." ALJ Ruling at 3. Thus, the ALJ's findings regarding the untimeliness of Petitioner's reconsideration request amount to dicta and are not germane to our review, which is limited to determining whether the ALJ's dismissal for lack of jurisdiction was legally correct.

The ALJ's decision to dismiss Petitioner's request for hearing for lack of jurisdiction is consistent with the governing regulations and Board precedent. An ALJ may dismiss a request for hearing if the petitioner "is not a proper party or does not otherwise have a right to a hearing." 42 C.F.R. § 498.70(b). Providers and suppliers have a right to a hearing before an ALJ if they are "dissatisfied with a reconsidered determination." *Id.* § 498.5(l)(2). The Board has held that "the regulations plainly require that CMS or one of its contractors 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 5 (2012). The

absence of a reconsidered determination thus renders NGS's initial determination, dated October 6, 2016, binding and administratively final. 42 C.F.R. § 498.20(b). *See also Haissam Elzaim, M.D.*, DAB No. 2501 (2013) (petitioner has no right to ALJ review of a revocation where petitioner argues that the reconsideration request was improperly dismissed as untimely); *Better Health Ambulance*, DAB No. 2475 (2012) (same).

Moreover, Petitioner is not entitled to appeal NGS's decision to dismiss Petitioner's request for reconsideration for untimeliness. *Karthik Ramaswamy, M.D.*, DAB No. 2563, at 7 (2014), *aff'd*, *Ramaswamy v. Burwell*, 83 F. Supp. 3d 846 (E.D. Mo. 2015). In *Ramaswamy*, the Board explained the limitations on its jurisdiction to hear appeals regarding the dismissal of a reconsideration request in the following way:

The regulations set out which contractor actions and determinations are reviewable. They do not provide for further review from a contractor dismissal of a reconsideration request as untimely. For us to entertain arguments that [the CMS contractor] applied erroneous standards, made erroneous findings, or reached erroneous conclusions in dismissing this reconsideration request would amount to reviewing the dismissal, which we, like the ALJ, have no authority to do.

Id. Here, NGS dismissed Petitioner's reconsideration request as untimely. Because such a dismissal, as the Board held in *Ramaswamy*, is not subject to review and because a provider or supplier has no right to ALJ review in the absence of a reconsidered determination, neither the ALJ, nor the Board, has the authority to review NGS's dismissal.

Conclusion

For the reasons stated above, we affirm the ALJ's September 1, 2017 ruling dismissing Petitioner's request for hearing.

_____/s/
Constance B. Tobias

_____/s/
Susan S. Yim

_____/s/
Sheila Ann Hegy
Presiding Board Member