

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Michael Reiner, M.D.,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-243

Decision No. CR2547

Date: June 11, 2012

DECISION DENYING REQUEST TO VACATE DISMISSAL

I deny the request of Petitioner, Michael Reiner, M.D., to vacate 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 I issued on April 25, 2012.

On April 30, 2012, this office received a Request to Vacate Dismissal (Request) and a Declaration in Support of Request to Vacate Dismissal (Decl.) from Petitioner's attorney. This is the attorney's first filing in this case, and she has not filed a Notice of Entry of Appearance in accordance with my Acknowledgement and Pre-Hearing Order.

I previously issued an order dismissing this matter for abandonment pursuant to 42 C.F.R. § 498.69 after Petitioner failed to file an ordered pre-hearing exchange and subsequently failed to respond to an Order to Show Cause. Petitioner now contends that his failure to file a pre-hearing exchange and timely respond to an Order to Show Cause was due to an error by his attorney. Petitioner claims he "informed his attorney . . . that he was going out of town and would have the Order dropped off at her office. The Order was misplaced and not calendared, and Counsel failed to timely respond." Request at 2. Petitioner's attorney states:

[Petitioner] explained that the denial was due to a failure to include a re-assignment of benefits form that was not submitted because the official with whom he was dealing with discussed the requirements with him but did not mention this one form. In spite of my clients [sic] clear instructions as to the delivery and response required, my office completely failed to properly docket, respond, and file this Order but misplaced it on the premises and to date cannot locate said Order. When the Order to Show Cause was served, not on counsel but on Petitioner, Petitioner sent it [to] me by email but I did not see the email until shortly after the 10 day deadline. Upon seeing the Order to Show Cause, I then recalled the earlier Order.

Decl. ¶¶ 4-5.¹

Petitioner admits his attorney negligently failed to file a pre-hearing exchange and did not timely respond to my Order to Show Cause issued on April 3, 2012. Request at 5. Petitioner requests that my Order Dismissing Case be vacated and contends that Petitioner should now be provided with the opportunity to submit his pre-hearing exchange. Request at 5-6.

An administrative law judge (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 . . . 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” *Id.*; *see also Sedgewick Health Care Ctr.*, DAB CR596 (finding a misunderstanding between petitioner and its counsel avoidable human error).

¹ The Declaration contains two paragraphs numbered 4.

