

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

Delaware Medical Associates, P.A.
Docket No. A-19-24
Decision No. 2938
April 29, 2019

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

Delaware Medical Associates, P.A. (Petitioner), a group medical practice, requested review of the Administrative Law Judge's (ALJ's) ruling denying its motion to vacate an order dismissing Petitioner's request for hearing. *Delaware Medical Associates, PA, Ruling Denying Motion to Vacate Order Dismissing Request for Hearing*, Docket No. C-18-1193 (Oct. 24, 2018) (Ruling). We affirm the Ruling for the reasons stated below.

Legal Background

The administrative appeal regulations which govern this case are set out in 42 C.F.R. Part 498. Under those regulations, a non-federal party may request a hearing before an ALJ to contest certain adverse initial or reconsidered determinations, in this case the latter. *See generally* 42 C.F.R. §§ 498.5. Two sections of the Part 498 regulations are relevant here. Section 498.69 provides that an ALJ "may dismiss a request for hearing if it is abandoned by the party that requested it," and further provides that the ALJ "may consider a request for hearing to be abandoned" if the party (1) "[f]ails to appear at the prehearing conference or hearing without having previously shown good cause for not appearing" and (2) "[f]ails to respond, within 10 days after the ALJ sends a 'show cause' notice, with a showing of good cause." For purposes of applying section 498.69, the Departmental Appeals Board (Board) has held that a party may "fail[] to appear" by not complying with an ALJ's order to submit pre-hearing documents. *Axion Healthcare Servs., LLC*, DAB No. 2783, at 3 (2017). Section 498.72 states that "[a]n ALJ may vacate any dismissal of a request for hearing if a party files a request to that effect within 60 days from receipt of the notice of dismissal and shows good cause for vacating the dismissal."

Case Background¹

On December 4, 2017, Novitas Solutions, a CMS contractor, deactivated Petitioner's Medicare billing privileges for failure to respond to Novitas' request for information it needed in connection with Petitioner's application to revalidate its Medicare enrollment. CMS Ex. 1, at 2, 20-21. On January 3, 2018, after receiving the requested information, Novitas approved Petitioner's revalidation application, reactivated Petitioner's billing privileges effective December 7, 2017, and notified Petitioner that it could contest the effective-date determination by filing a request for reconsideration within 60 days. *Id.* at 2, 50-53. Petitioner timely filed a request for reconsideration, which Novitas denied on May 21, 2018, stating that Petitioner "ha[d] not provided evidence to support an earlier effective date." *Id.* at 1-5, 54-55.

In July 2018, Petitioner filed by mail a request for hearing with the Departmental Appeals Board's (DAB's) Civil Remedies Division. On August 7, 2018, the ALJ acknowledged the hearing request and issued a Prehearing Order, which the Civil Remedies Division mailed to Petitioner at the address shown on its hearing request. The Prehearing Order advised Petitioner that it was required to use the Departmental Appeals Board's electronic filing system, called DAB E-File, "to file all pleadings and required documents," and that if a party was unable to file documents electronically, it needed to file "a written request for waiver [of the requirement to use DAB E-File] within ten days of the date of this Order" – that is, by August 17, 2018. The Prehearing Order also directed CMS to file its "prehearing exchange" (consisting of its documentary evidence, written legal argument, and other material) within 30 days of the date of the order, and Petitioner to file its prehearing exchange within 60 days. The ALJ sent Petitioner a copy of the Civil Remedies Division Procedures along with the Prehearing Order.

CMS timely filed its prehearing exchange on September 5, 2018. That same day, the ALJ mailed Petitioner an Order to Show Cause. The order stated that Petitioner had not complied with the electronic filing provisions in paragraph I of the Prehearing Order, which required Petitioner to register for DAB E-File or request a waiver of that requirement within 10 days. The order then instructed:

¹ The facts stated in this section are drawn from the record before the ALJ and are undisputed unless otherwise indicated.

Not later than September 21, 2018, Petitioner will show cause 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 Prehearing Order. If Petitioner did not intend to abandon its request for hearing, Petitioner will respond to this Order to Show Cause and comply with the requirements of the Prehearing Order including filing any documents or taking other actions required by the Prehearing Order for which deadlines have passed. If Petitioner no longer desires review by an administrative law judge Petitioner should file a statement withdrawing the request for hearing.

Sept. 5, 2018 Order to Show Cause at 1. The Order to Show Cause warned Petitioner that failure to respond “will result in dismissal of the request for hearing.” *Id.* at 2.

On October 4, 2018, after receiving no response to the Order to Show Cause, the ALJ concluded that Petitioner had abandoned its hearing request and dismissed the case under 42 C.F.R. § 498.69. The ALJ’s “Order Dismissing Case for Abandonment” (Dismissal Order) advised Petitioner that it could ask for the dismissal to be vacated for “good cause.” Dismissal Order at 2.

On October 22, 2018, a month after its response to the Order to Show Cause was due, the ALJ received a letter from Petitioner. The letter’s body states in relevant part:

Please be advised that we have not abandoned our case. Rather, we have sent to you, as well as the Medical Society of De[laware] and Senator Coon’s office, all the evidence regarding our claim.

We are a small office and are not computerized, therefore, providing such in computer form represents an undue hardship and burden.

The ALJ treated this letter as a motion to vacate the Dismissal Order and denied the motion in the Ruling we are reviewing here. The ALJ concluded that Petitioner “ha[d] not shown good cause for its lack of diligence in pursuing this case and ignoring the requirements of the Prehearing Order.” In support of that conclusion, the Ruling states:

Petitioner has not attempted to explain why it failed to timely respond to my Order to show cause. Petitioner was provided ample opportunity to comply with my initial Prehearing Order and to respond to the order to show cause. Petitioner failed to act despite my warning that failure to respond to the order to show cause would be treated as abandonment of the request for hearing. . . .

Ruling at 2.

On November 8, 2018, Petitioner filed another letter with the ALJ, which states in relevant part:

Please be advised that we have not abandoned our case with regards to your latest letter to us dated October 24, 2018. In your letter you stated that we did **NOT** request a waiver for the E-File but we **did** send you a **certified letter** on August 21, 2018 & upon checking the USPS website the letter was delivered to the Post Office in Washington, DC on 8/24/18 but there is no tracing after that to your office. I am enclosing our letter from 8/21/18 & proof that we sent it but it still may be sitting at the post office & we have no control over the postal employees.

We would appreciate it if you would reverse your dismissal of our case for abandonment as we clearly had not abandoned our case.

The Civil Remedies Division forwarded this letter to the DAB's Appellate Division, which docketed the letter on November 15, 2018, as a request for review of the ALJ's Ruling.

On November 20, 2018, the Appellate Division acknowledged receipt of Petitioner's request for review and notified the parties of deadlines for the submission of CMS's response and Petitioner's reply. On November 28, 2018, CMS filed its response to the request for review, which CMS served on Petitioner by first class mail. Petitioner did not file a reply to CMS's response.

On December 7, 2018, the Civil Remedies Division added to its case docket a previously "omitted" letter from Petitioner that had been received by the Civil Remedies Division on August 27, 2018.² The letter – a copy of which Petitioner attached to its request for review – is dated August 17, 2018, but the request for review refers to it as "our letter from 8/21/2018," and the postal tracking number on the letter's envelope reveals that the letter did not come into the post office's possession until August 21, 2018. *See* Attachment to the Request for Review (showing the history for postal tracking number 70083230000299845857).

On December 10, 2018, the ALJ issued an "Amended Ruling Denying Motion to Vacate Order Dismissing Request for Hearing" (Amended Ruling). After acknowledging Petitioner's August 2018 filing, the Amended Ruling states that its purpose was to

² The Civil Remedies Division explained that, due to a staff member's "oversight," the letter had not been uploaded to DAB E-File in accordance with the division's "standard practice" when it receives a party's "mailed filing." Civil Remedies Division Director's Memorandum, Docket No. C-18-1193 (Dec. 7, 2018).

“clarify” that “the dismissal in this case was based upon Petitioner’s failure to respond to the Order to Show Cause and not based upon failure to request a waiver of the requirement to register for and use DAB E-File.”

Discussion

When the ALJ issued the Amended Ruling on December 10, 2018, he no longer had jurisdiction over this matter since the Board had docketed Petitioner’s request for review of the ALJ’s Ruling on November 15, 2018. Accordingly, we are reviewing the ALJ’s Ruling (of October 24, 2018), not the ALJ’s Amended Ruling. The Board reviews the Ruling to determine whether the ALJ abused his discretion in denying Petitioner’s motion to vacate the dismissal. *Maximum Hospice and Palliative Care*, DAB No. 2898, at 4 (2018); *Burien Nursing and Rehab. Ctr.*, DAB No. 2870, at 5 (2018).

In his Ruling, the ALJ found that good cause did not exist to vacate the Dismissal Order because Petitioner had ignored requirements of the Prehearing Order and had failed to explain its failure to respond to the September 5, 2018 Order to Show Cause. The record substantiates the ALJ’s stated reasons for not finding good cause. Petitioner did not, in its October 22, 2018 letter or otherwise, explain or otherwise attempt to excuse its failure to respond to the show-cause order. Petitioner does not deny receiving that order or dispute the ALJ’s finding that it had “ample opportunity” to respond to it. Nor does Petitioner deny that it had been warned in advance that failure to respond to the show-cause order would lead to dismissal of its hearing request.

With respect to the waiver issue, while the Civil Remedies Division’s post-appeal record indicates that Petitioner requested a waiver of the electronic filing requirement in late August 2018, that request was not filed until after the applicable ten-day deadline (August 17, 2018) set by the ALJ in his Prehearing Order. The Civil Remedies Division Procedures sent to Petitioner with the Prehearing Order advised that documents not filed electronically were considered filed the date placed in the United States mail or with an express delivery service. Civil Remedies Division Procedures at 9. Although Petitioner’s waiver letter is dated August 17, 2018, postal tracking records submitted to us by Petitioner show that the letter was not placed in the United States mail until August 21, 2018. Because the record confirms that Petitioner did not timely file a pre-hearing document (the waiver request) in accordance with the ALJ’s Prehearing Order and inexplicably failed to respond to the ALJ’s show-cause order, it was not an abuse of discretion for the ALJ to deny Petitioner’s motion to vacate, regardless of when the ALJ learned of the waiver request. *Cf. Consol. Cmty. Res, Inc.*, DAB No. 2676, at 5 (2016) (upholding a section 498.69 dismissal because the appellant did not respond to an order to show cause while also noting that an ALJ “has discretionary authority to impose sanctions on a party that fails to adhere to his or her orders”).

In its request for the review, Petitioner objects to Novitas’s “original denial.” It is unclear what determination Petitioner is referring to. Only Novitas’s reconsidered determination was appealable to the ALJ. 42 C.F.R. § 498.5(1)(2); *Willie Goffney, Jr., M.D.*, DAB No. 2743, at 4-5 (2016), *pet. to reopen denied*, DAB Ruling 2017-5 (Sept. 15, 2017). But even if Petitioner is referring to the reconsidered determination, the merits of Novitas’s denial are not before us. The ALJ dismissed Petitioner’s hearing request, and later denied a motion to vacate the dismissal, without deciding whether or not Petitioner’s objection to Novitas’s action had merit. Because the ALJ did not reach the case’s merits, and because we find no basis to overturn the denial of the motion to vacate the Dismissal Order, we may not entertain any contentions about the validity of Novitas’s actions.

For the reasons stated above, we affirm the ALJ’s Ruling denying Petitioner’s motion to vacate the dismissal of its request for hearing.

/s/

Constance B. Tobias

/s/

Susan S. Yim

/s/

Sheila Ann Hegy
Presiding Board Member