

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Experts Are Us, Inc.,)	Date: December 18, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-724
)	Decision No. CR2047
Centers for Medicare & Medicaid)	
Services.)	

DECISION

I dismiss Petitioner’s hearing request pursuant to 42 C.F.R. § 498.70 because Petitioner has no right to a hearing.

Background

Apparently, Petitioner, Experts Are Us, Inc., once participated in the Medicare program as a supplier of durable medical equipment. However, the Medicare Carrier, National Supplier Clearinghouse, determined that the supplier was no longer in operation after on-site inspectors found the business closed and its telephone number disconnected. In a letter dated December 22, 2003, the Carrier advised Petitioner that its Medicare supplier number was revoked. The letter also advised Petitioner of its appeal rights. CMS Ex. 1.

In a letter dated February 28, 2004 (but inexplicably also dated March 27, 2004), Petitioner requested reconsideration. P. Ex. 1.¹ In response, the carrier apparently

¹ Civil Remedies Division procedures and my initial order in this case include detailed instructions for marking exhibits. Petitioner disregards those instructions, and attaches to its brief multiple documents that are not marked in any identifiably coherent fashion. The bulk of its submissions have no apparent relevance to the issues before me. To assist the reader, I have culled from that jumble those documents that seem relevant, marked them, and attached them to this decision.

attempted another site inspection, but was again unsuccessful. In a letter dated March 30, 2004, the carrier informed Petitioner that it still was not in compliance with federal regulations, but, if dissatisfied with that determination, it could request a hearing.² P. Ex. 2. As discussed below, at this time, a supplier could appeal to a carrier hearing officer, but was not entitled to a hearing before an administrative law judge (ALJ).

Petitioner has not shown that it thereafter requested a hearing. Apparently, in a memo dated April 8, 2004, it asked the carrier to reopen and complete another inspection of its premises. P. Ex. 4 (attached to Petitioner's hearing request, but not submitted with its brief).

Since then, Petitioner apparently has repeatedly but unsuccessfully applied to reactivate its supplier number. Responding to a Congressional inquiry, the carrier prepared a list of those applications, and Petitioner includes some of them with its exhibits. P. Ex. 5. Petitioner also includes evidence of additional efforts to reactivate its application. P. Exs. 6-11; *see also* P. Ex. 12. The most recent carrier denials in this record are dated December 11, 2007. P. Exs. 11, 12.

What we have treated as Petitioner's hearing request here is dated June 16, 2009, but was postmarked September 9, 2009, and received in the Civil Remedies Division on September 15, 2009. It refers to a purportedly pending appeal but does not identify the exact determination Petitioner wants reviewed in this forum.³

² Petitioner submits with its brief only the first page of the March 30, 2004 letter. However, attached to its hearing request as Exhibit 19C is what appears to be the entire letter, which advises Petitioner of its appeal rights ("you must file your request within 90 days from the postmark of this letter"). P. Ex. 3.

³ Petitioner has submitted a very peculiar memo, dated May 15, 2009, and addressed to "health [sic] and Human Services" at an address that is not the correct address for the Departmental Appeals Board. Petitioner claims, without providing any supporting documentation, that its appeal was forwarded (apparently by someone working for Blue Cross/Blue Shield in South Carolina) "to Washington D.C. 20024, delivered on 09-10-2007@ 10:41 a.m. 20202." Petitioner also claims to have "called to inquire on the status of the appeal," and been informed that "this package was entered as a change of information." P. Ex. 13. The Civil Remedies Division has no record that it received a hearing request from Petitioner prior to September 2009. CMS Ex. 3. I have no idea what the term "a change of information" refers to; it is not a standard Civil Remedies Division procedure.

But an even more peculiar submission was submitted on November 5, 2009, via email, by an attorney who failed to file an appearance. She claimed that an appeal was mailed to the Department of Education's Office of Inspector General, who received it October 26, 2007, and forwarded it to the Department of Health and Human Services

CMS now moves to dismiss, arguing that Petitioner has no right to a hearing. CMS has filed a motion to dismiss and a reply brief with three exhibits attached (CMS Exs. 1-3). As noted above, Petitioner has filed a brief accompanied by multiple documents, some of which I have marked and attached to this decision. (P. Exs. 1-13).

Discussion

Petitioner fails to identify the specific determination it challenges. Under the regulations, a hearing request *must* “identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees,” and must specify the basis of contending that those findings and conclusions are incorrect. 42 C.F.R. § 498.40(b). Obviously, the documents Petitioner has filed do not satisfy this regulatory requirement. Nevertheless, I consider whether I have the authority to review any of the determinations I found among Petitioner’s submissions.

1. I have no authority to review the revocation of Petitioner’s supplier number because it occurred prior to December 8, 2004.⁴

Section 1866(j)(2) of the Social Security Act creates appeal rights for Medicare providers and suppliers whose applications for Medicare enrollment or renewal of enrollment have been denied. That provision was enacted in 2003, as part of the Medicare Prescription Drug Improvement and Modernization Act (MMA) of 2003. Pub. L. No. 108-173, § 936(a)(2). Under the provisions of that statute, hearing rights apply to denials occurring “on or after such date as the Secretary [of Health and Human Services] specifies,” but no later than one year after the effective date of the statute. The statute’s effective date was December 8, 2003. MMA § 936(b)(3); 42 USCA § 1395cc(b)(3). The Secretary determined that all denials or revocations with a decision date of December 8, 2004, or later, would be reviewable by an Administrative Law Judge. Change in Provider Enrollment Appeals Process, CMS Manual System, Pub. 100-08, Transmittal 95 (January 14, 2005), *available at* <http://www.cms.hhs.gov/transmittals> (follow hyperlink “2005 Transmittals”); CMS Ex. 2. Because Petitioner’s Medicare enrollment was revoked prior to December 8, 2004, it is not reviewable in this forum and must be dismissed. 42 C.F.R. § 498.70(b) (The ALJ may dismiss a hearing request if the party requesting does not have a right to a hearing).

Office of Inspector General. The submission discusses Petitioner’s unsuccessful efforts in a federal court lawsuit, and asks that I consider the case “so that there will be no question of whether there was exhaustion of administrative remedies,” but it does not identify the determination Petitioner wants considered.

⁴ My findings of fact/conclusions of law are set forth, in italics and bold, in the discussion captions of this decision.

2. The denials of Petitioner's applications for reinstatement are not reviewable in this forum.

Nor may Petitioner appeal the subsequent denials of her applications for reinstatement. Only initial determinations, which are listed at 42 C.F.R. § 498.3(b), may be appealed to this forum, and I have no authority to review actions that are not initial determinations. 42 C.F.R. § 498.3(d). Determinations regarding a supplier's reinstatement are not among the initial determinations listed. Moreover, since August 26, 2008, regulations explicitly have precluded review of a Medicare contractor's refusal to reinstate a supplier's billing privileges. Medicare Program; Appeals of CMS or CMS Contractor Determinations When a Provider or Supplier Fails to Meet the Requirements for Medicare Billing Privileges, 73 Fed. Reg. 36,448 & 36,460 (June 27, 2008). 42 C.F.R. § 405.874(e) provides that a "contractor's refusal to reinstate a supplier's billing privileges . . . is not an initial determination under part 498 of this chapter."

I note also that requests for review under section 498 must be filed within 60 days from receipt of the notice of the initial determination. 42 C.F.R. § 498.40(c). I may dismiss an untimely hearing request. 42 C.F.R. § 498.70(c). The most recent denial of reinstatement in this record is dated December 11, 2007, one year and nine months prior to the submission of Petitioner's hearing request.

Finally, Petitioner raises constitutional claims, which I have no authority to review.

Conclusion

Petitioner has no right to a hearing and its hearing request is dismissed pursuant to 42 C.F.R. § 498.70(b).

/s/
Carolyn Cozad Hughes
Administrative Law Judge