

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Experts Are Us, Inc.
Docket No. A-10-96
Decision No. 2342
November 4, 2010

RULLING ON REQUEST FOR REOPENING
OF DAB NO. 2322 AND
FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION DAB CR2180

Experts Are Us, Inc. (Experts) has filed a 14-page document that we construe as a request to reopen the Board decision in *Experts Are Us, Inc.*, DAB No. 2322 (2010) (Board Decision) and an appeal of the decision of Administrative Law Judge Carolyn Cozad Hughes in *Experts Are Us, Inc.*, DAB CR2180 (2010) (ALJ Decision Remand).

These decisions concerned Experts' attempts to obtain ALJ review of a Medicare contractor's determinations affecting Experts' participation in Medicare, pursuant to section 1866(j)(8) of the Social Security Act (Act) (formerly section 1866(j)(2)).

In the Board Decision, the Board upheld and reversed parts of the 2009 ALJ decision in *Experts Are Us, Inc.*, DAB CR2047 (2009) (ALJ Decision). The Board upheld the ALJ's determination that, because the contractor revoked Experts' billing privileges prior to December 8, 2004, she had no authority under section 1866(j)(8) to review that revocation. Board Decision, DAB No. 2322, at 7-8. The Board reversed the ALJ's determination that she had no authority to review the contractor's subsequent denials of Experts' reenrollment applications and remanded the case to the ALJ for further proceedings regarding three denials. *Id.* at 9-10. The ALJ remanded the case to the Centers for Medicare & Medicaid Services (CMS), which administers Medicare, to reconsider the three denials of Experts' applications. ALJ Decision Remand, DAB CR2180, at 2.

Experts now seeks to reopen the Board decision (*see* 42 C.F.R. § 498.100) and to appeal the ALJ Decision Remand (*see* 42 C.F.R. § 498.80).

For the reasons discussed below, we decline to reopen the Board Decision, and we uphold the ALJ Decision Remand. We also deny Experts' request to file additional evidence, its request for admissions, and its request for subpoenas.

Standard of review

The Board may reopen a decision, within 60 days of the date of notice of the decision, upon its own motion or the request of either party. 42 C.F.R. § 498.100. The regulations do not specify a standard for granting a request to reopen. Procedures applicable to other types of disputes provide that the Board may reconsider a decision when a party promptly alleges a clear error of fact or law. 45 C.F.R. § 16.13. This standard is reasonably applied here as well. Reopening a Board decision is not a routine step under the Board's regulations in 42 C.F.R. Part 498. Rather, it is the means for the parties and the Board to point out and correct any errors that make the decision clearly wrong. *Peter McCambridge, C.F.A.*, Ruling No. 2010-1, at 1 (Feb. 2, 2010).

On appeal of an ALJ decision, 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>.

History of the Case Before the ALJ and Board

In September 2009, the Civil Remedies Division of the Departmental Appeals Board received a set of documents from Experts. It docketed the documents as Docket No. C-09-724 and assigned them to an ALJ for review. Thereafter, Experts, through its owner Rita Lemons, submitted additional arguments and documents. The arguments, like those addressed in the instant ruling and decision, often lacked clarity and the documents were voluminous and poorly organized and indexed. However, after reviewing the documents, the ALJ concluded that Experts was seeking, among other things, a review of a 2004 determination by a CMS contractor revoking its Medicare billing privileges as a durable medical equipment, prosthetics, orthotics, and supplies supplier (DMEPOS supplier) and dispositions by the contractor of its subsequent applications. ALJ Decision, DAB CR2047, at 4. The ALJ determined that Experts had no right to ALJ review of the revocation because it occurred before the effective date of the statutory provision that created this hearing right, section 1866(j)(8).¹ *Id.* at 4. She concluded that Experts had

¹ 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) provided:

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). Section 1866(j)(2) was redesignated 1866(j)(7) in Pub. L. No. 111-148, § 6401 (Dec. 24, 2009) and 1866(j)(8) in Pub. L. No. 111-152, § 1304 (March 30, 2010). Presently, two consecutive sections in title 42 of the Act bear the designation "1866(j)(8)." When we cite section 1866(j)(8) in this decision, we are referring to the second designation.

The Secretary has interpreted section 1866(j)(8) to apply also to revocations of enrollment. 42 C.F.R. § 498.1(g).

no right to review of the contractor's subsequent dispositions of Experts' applications because they were "applications for reinstatement" after revocation and, therefore, not reviewable under 42 C.F.R. Part 498. *Id.* at 5. She dismissed the case.

Experts appealed the ALJ's dismissal to the Board, and the appeal was assigned Board Docket No. A-10-38. In response to the Board's Order to Develop the Record, CMS stated that the August 1, 2007, December 11, 2007, and May 30, 2008 contractor determinations contained in Experts' documents before the ALJ were denials of reenrollment applications and that denials of reenrollment applications, like denials of enrollment applications, were within the ALJ's review authority under section 1866(j)(8).² CMS's position was contrary to its prior position before the ALJ in which it had argued that these contractor determinations were rejections of requests for reinstatement after revocation. CMS suggested the case be remanded to the ALJ. *Id.* After upholding the ALJ's conclusion that she lacked authority to review the 2004 revocation, the Board remanded the case to the ALJ for "further proceedings consistent with this decision" as to the August 1, 2007, December 11, 2007, and May 30, 2008 denials of reenrollment. Board Decision at 12. Thereafter, pursuant to 42 C.F.R. § 498.78(b), the ALJ remanded the case to "CMS or its Medicare contractor to reconsider its August 1, 2007, December 11, 2007, and May 30, 2008 determinations denying [Experts'] applications for reenrollment in the Medicare program." ALJ Decision Remand, DAB CR2180, at 1. The ALJ directed CMS or its contractor "to reconsider the contractor's initial determinations, dated August 1, 2007, December 11, 2007, and May 30, 2008, in accordance with 42 C.F.R. §§ 498.22 and 498.24." *Id.* at 2.

On September 2, 2010, Experts submitted the following documents: a 14-page document titled "Appeal 2322" (Appeal); a five-page document titled "Motion to Admit or Deny Appeal 2322"; a two-page document titled "Re: Appeal 2322"; a three-page document described as a "calculation table"; and 37 pages of records, such as phone and insurance records.³

These documents contain numerous allegations, citations to irrelevant legal authorities, and requests for relief (including for the award of hundreds of thousands of dollars and the instigation of criminal proceedings against CMS personnel). After reviewing Expert's documents, we conclude that they are most reasonably and fairly understood to be: (1) a request to reopen the Board's decision in DAB No. 2322; (2) an appeal of the ALJ Decision Remand in DAB CR2180; (3) a request to file additional evidence; and (4) a request for admissions and subpoenas. Below we discuss each of these matters.

² As discussed in the Board Decision, CMS distinguishes between denials of applications and rejections of applications. Board Decision, DAB No. 2322, at 4 citing 42 C.F.R. §§ 424.530 and 424.525. Rejected applications "are not afforded appeal rights." 42 C.F.R. § 424.525(d). The record contains both denials of reenrollment applications and rejections of reenrollment applications. The Board Decision addressed the denials.

³ Experts represents that it mailed the submission at issue on September 2, 2010. Email dated September 20, 2010. The entry on the delivery receipt, although not entirely legible, and the date of actual receipt are consistent with that representation.

Request for Reopening

Experts filed its request for reopening within “60 days from the date of the notice of decision,” which was July 6, 2010. Therefore, we find that Experts has filed a timely request under 42 C.F.R. § 498.100(a) to reopen DAB No. 2322.

The assertions in the documents filed by Experts are unorganized and lack clarity. However, as best we can discern, Experts takes issue with the following holdings in DAB No. 2322: the ALJ did not have authority to review CMS’s revocation of Experts’ billing privileges because the revocation occurred prior to the December 8, 2004 effective date of section 1866(j)(8) (Appeal at 1, 5, 7, 10, 11-13); the ALJ did not have authority to award Experts money damages (*id.* at 1-2, 3, 4, 5, 9) or review denials of claims for items Experts allegedly provided to Medicare beneficiaries prior to the revocation of its billing privileges (*id.* at 7, 9); the ALJ did not have authority to review Experts’ allegations of constitutional violations and other wrongs committed against it by CMS, contractor employees, and others (*id.* at 2, 3, 4, 6, 10, 12, 13); the ALJ did not err by not reviewing CMS’s alleged failure to comply with the Freedom of Information Act (FOIA) (*id.* at 10, 12). Experts also objected to statements on timeliness. *Id.* at 10. Finally, Experts asked that the ALJ be directed to review the contractor’s disposition of an application allegedly filed on February 28, 2008. *Id.* at 12.

Below we explain why we conclude that Experts has failed to allege any error of fact or law in the Board Decision, much less a clear error of fact or law that would necessitate reopening DAB No. 2322.

1. Effective date of appeal rights

Section 1866(j)(8) provides for ALJ review of CMS’s revocation of a supplier’s Medicare enrollment. Experts asserts that section 1866(j)(8) applies to revocations occurring on or after December 8, 2003. Appeal at 1, 5, 7, 10, 11-13. It argues that treating the effective date as December 8, 2004 (as the ALJ did) “mak[es] the Secretary’s specification of the word ‘ON’ void.” *Id.* at 1; *see also* 10-11, 12.

Experts’ argument fails to address the basis for the ALJ’s and the Board’s conclusion that section 1866(j)(8) hearing rights apply to revocations occurring on or after December 8, 2004. *See* ALJ Decision, DAB CR2047, at 2-3; Board Decision, DAB No. 2322, at 2-3, 7-8. As explained in those decisions, section 1866(j) was enacted on December 8, 2003 as part of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA), Pub. L. No. 108-173, § 936. At that time, Congress stated that section 1866(j)(8) 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) as the Secretary specifies.” MMA § 936(b)(3). Thereafter, the Secretary, through CMS, issued a transmittal stating that only denials or revocations with decision dates of December 8, 2004, or later, would be reviewable by an ALJ. ALJ Decision, DAB CR2047, at 3 citing 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).⁴ Therefore, the Secretary, as authorized by Congress, adopted an effective date of December 8, 2004 for section 1866(j)(8), and the Board correctly affirmed the ALJ's conclusion that she had no authority to hear an appeal of the revocation of Experts' billing privileges because it occurred well before that date.

2. Alleged violations of Experts' and Ms. Lemons' rights; award of money damages; award of reimbursement for items allegedly provided to Medicare beneficiaries

Experts alleges that CMS, the contractor, and others have violated its and Ms. Lemons' constitutional rights and engaged in other tortious conduct toward them. Appeal at 2, 3, 4, 6, 10, 12, 13. These allegations concern CMS and contractor conduct in revoking Experts' billing privileges and denying its reenrollment applications and other matters. Experts argues that the Board erred in concluding that the ALJ did not have authority to consider these allegations of wrongdoing and to award damages. *Id.* at 1-2, 3, 4, 5, 9. It also argues that the Board erred by holding that the ALJ did not have authority to order CMS to reimburse Experts for items that it allegedly supplied to Medicare beneficiaries prior to the revocation of its billing privileges. *Id.* at 7, 9.

Experts' arguments are without merit. The authority of the Departmental Appeals Board's (DAB) ALJs and the Board to adjudicate disputes is established by statutes, regulations, and delegations by the Secretary or heads of Department of Health and Human Services operating components. Under 42 C.F.R. Part 498, the DAB ALJs and the Board are authorized to adjudicate "initial determinations" related to provider and supplier enrollment in Medicare, including denials of reenrollment applications. 42 C.F.R. §§ 498.3(b)(5); 498.40; 498.44; 498.80. As to Experts' assertions that the ALJ should hear its claims for damages resulting from CMS's and the contractor's allegedly wrongful conduct in revoking its billing privileges and denying its reenrollment applications, nothing in Part 498 or any other authority identified by Experts authorizes the ALJ or the Board to hear such damage claims. As to Experts' assertions that the ALJ should hear its claims for reimbursement for items allegedly provided to Medicare beneficiaries prior to the revocation of its billing privileges, nothing in Part 498 authorizes such review and other regulations expressly provide for this review in another forum, not by the DAB ALJs. Compare 42 C.F.R. Part 405, subpart H (2003) and subpart I (2005), with Part 498, subpart A and Part 424, subpart P.

3. FOIA

Experts argues that the Board erred by not requiring the ALJ to address Experts' complaints concerning CMS's alleged failure to respond to Experts' FOIA requests. Appeal at 10, 12. Experts alleges that it proved such FOIA noncompliance before the ALJ and that the ALJ had authority to review that noncompliance under 42 C.F.R. § 498.60. *Id.* at 12.

⁴ Prior to the enactment of section 1866(j)(8) and the issuance of Transmittal 95, CMS provided non-ALJ hearing review to suppliers whose billing privileges were terminated. *See* P. Ex. 1, attached to ALJ Decision, DAB CR2047 (CMS notice dated December 22, 2003 revoking Experts' billing privileges and explaining appeal rights).

As we previously explained, the ALJ has no authority to enforce FOIA. DAB Decision 2322, at 11, citing 5 U.S.C. § 552(a)(4)(B); 45 C.F.R. § 5.34. Section 498.60 does not create such authority. It provides:

(b) Hearing procedures. (1) The ALJ inquires fully into all of the matters at issue, and receives in evidence the testimony of witnesses and any documents that are relevant and material.

Section 498.60 describes an ALJ's role at a hearing to which the hearing procedures at 42 C.F.R. Part 498, subpart D apply. Different procedures apply to disputes under FOIA.

4. Timeliness

Experts argues that the Board erred by stating that Experts filed a pro se submission seeking review of CMS determinations with the Civil Remedies Division in 2009.⁵ Appeal at 10, citing DAB No. 2322, at 5. Experts asserts that it filed timely appeals of CMS/contractor determinations beginning in 2003, but they were “blocked, misdirected, not processed” *Id.*

The Board's statement is correct and not a basis to reopen the Board Decision. Whatever Experts' intentions were in sending submissions to a range of addressees prior to 2009, it is undisputed that the Civil Remedies Division first received documents from Experts in 2009.

5. February 28, 2008 application

In the Board Decision, we directed further review of the contractor's reenrollment denials dated August 1, 2007, December 11, 2007 and May 30, 2008. We addressed these three determinations in the Order to Develop the Record (and then the Decision) because (1) those are disposition letters that Experts submitted with its hearing request, and (2) those are the disposition letters for which NSC made its determinations based 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. Board Decision, DAB No. 2322, at 6 n.5.

Experts appears to assert that the Board should have required the ALJ to review the contractor's disposition of an application it allegedly submitted February 28, 2008. Experts states:

Petitioner reassert[s] that she presented in the briefs a notarized affidavit regarding an 855 S application submitted February 28, 2008 and the USPS delivery tracking receipt used to forward the document. Pursuant to 498.60(b), this submission is

⁵ Experts also disputes the ALJ's statement in the ALJ Decision that it did not request a hearing on the 2004 revocation of its billing privileges. Appeal at 6 citing ALJ Decision at 2. Whether Experts did or did not request a hearing is irrelevant here. The ALJ dismissed Experts' request for an ALJ hearing on the 2004 revocation because the revocation occurred prior to December 8, 2004, not because she found a request was untimely.

viewable by the ALJ and should have been included in the scope of review as it was presented in the briefs. Plaintiff request[s] the ALJ to order the Defendants to disprove this allegation of receipt of 855 S application.

Appeal at 12. Experts did not provide any citations to where in the hundreds of pages of the record these documents might be found. In the record before the ALJ, we found references by Ms. Lemons to a February 28, 2008 application, including in an affidavit. In that affidavit she stated that the contractor informed her that “one of the applications submitted in April 2008 cancelled the Application submitted in February out. The other April 2008 application [was] processed and it was denied on May 30, 2008.” See “Motion for Entry of Order” filed in C-09-724, the last quarter of attachments. Elsewhere Ms. Lemons said that the February 28, 2008 application was “denied May 30, 2008 due to a misappropriated lock out by the leasing management in which my business is located.” *Id.* at July 25, 2008 document titled “Request for Expedited Appeal Process as provided pursuant rule 405.718” at 8 (emphasis added), also at 11-12. (The May 30, 2008 denial letter is located at Exhibit 36(9), attached to a submission in C-09-724 received from Experts on September 15, 2009.)

Experts’ statements about a February 2008 application are not a basis for reopening the Board Decision (or reversing the ALJ Decision Remand). The Board and ALJ directed reconsideration of the May 30, 2008 denial. Based on Ms. Lemons’ own statements, the May 30, 2008 denial was either the disposition of the February 2008 application or the April 2008 application (which, according to Ms. Lemons, purportedly “cancelled” the February application). In either case, the May 30, 2008 disposition reflected the contractor’s determination about whether Experts’ reenrollment application should be approved or denied at that time, which is what is at issue in the remand.

Appeal of ALJ Decision Remand

Experts argues that the ALJ erred by remanding the case to CMS to reconsider the contractor’s denials of Experts’ reenrollment applications in accordance with 42 C.F.R. §§ 498.22 and 498.24. Appeal at 7, 8. Experts “objects to Appeal being remanded back to CMS on the ground that the preponderance of the evidence prove the respondents are guilty for the allegations and are not competent to make a fair and honest decision, considering they could have 7 years ago elected to render an unbiased determination.” *Id.* at 8.

Experts has failed to offer any basis for concluding the ALJ erred in remanding the case to CMS.

The Board directed the ALJ to provide appropriate hearing rights to Experts for the contractor’s denials of specific reenrollment applications. Board Decision at 9-10. On remand, the ALJ pointed out that the appeal process set forth in 42 C.F.R. Part 498 provides for reconsideration by the contractor of a denial of an enrollment application prior to ALJ review. ALJ Decision Remand at 2, citing 42 C.F.R. § 498.22; *see also* 42

C.F.R. § 405.874(c). This step of the Part 498 review process had never occurred. Therefore, the ALJ remanded the case to CMS for reconsideration hearings as provided in 42 C.F.R. §§ 498.22 and 405.874. This action was not precluded by the Board Decision and is consistent with the regulations governing review of denials of DMEPOS enrollment applications in effect at the time of the remand.⁶

Experts does not object to the ALJ's reading of the Part 498 regulations or her finding that reconsideration had not been provided pursuant to those regulations. Rather, it asks us to presume that CMS and the contractor have acted in bad faith and will continue to do so. We are not willing to make such presumptions, particularly where CMS has now conceded that the decision letters at issue are denials of enrollment applications within the meaning of 42 C.F.R. § 424.530(a)(1) and Experts will have a right to appeal the contractor's reconsidered determinations to the ALJ. Therefore, we uphold the ALJ Decision Remand and deny Experts' apparent request that we order the ALJ "to schedule an Oral Hearing." Appeal at 1.

Ruling on Experts' Other Requests

Experts filed a document titled "Motion to Admit or Deny" containing 56 numbered paragraphs setting forth questions. Elsewhere, Experts refers to this document as being filed pursuant to "Rule 36," which we infer to be a reference to Rule 36 of the Federal Rules of Civil Procedure (FRCP). Appeal at 8, 11, 14. Rule 36 concerns requests for admissions. We deny this "motion." Leaving aside the fact that the contents of the motion are framed as questions rather than facts to be admitted or denied, the Board is not bound by the FRCP and Part 498 does not provide for discovery in appellate reviews of ALJ decisions (or in requests to reopen). We deny Experts' request for subpoenas for the same reasons. *Id.* at 11, 14. In addition, section 498.63 (which Experts cites in conjunction with its subpoena request and which pertains to parties' summations) is not relevant to this review proceeding.

Experts also requests an opportunity to file additional evidence consisting of telephone and insurance records. *See* two-page document titled "Re: Appeal 2322" and 37 pages of records. Most of the records involve events in 2003 and 2004 and seem to be related to Experts' arguments that its billing privileges were wrongly revoked in 2004. We decline to admit these documents. Section 498.86(a) of 42 C.F.R. provides for admission of additional evidence in an appeal before the Board "except for provider and supplier enrollment appeals." This is a supplier enrollment appeal, thus these documents are not admissible. In any event, Experts has failed to show how these records are relevant to its appeal of the ALJ's remand. Pursuant to that remand, this matter is now before CMS or the CMS contractor, and Experts will have the right to appeal any adverse reconsidered determinations to a DAB ALJ. Experts should familiarize itself with the procedures that apply to that process, including procedures, if any, pertaining to submission of evidence

⁶ At the time of these denials, the MPIM provided for contractor hearing officer review of enrollment denials prior to ALJ review for all suppliers, including DMEPOS suppliers. *See* Transmittal 95 (January 14, 2005) revising Chapter 10, § 19 of the MPIM at <http://www.cms.gov/Transmittals/Downloads/R95PI.pdf>.

not already in the record before the contractor. *See, e.g.*, 42 C.F.R. Part 498, subpart B; § 498.56(e); § 405.874(c).

Conclusion

For the foregoing reasons, we deny Experts' request to reopen DAB No. 2322, to reverse DAB CR2180, and to grant other miscellaneous relief sought in its September 2, 2010 filing.

_____/s/
Judith A. Ballard

_____/s/
Constance B. Tobias

_____/s/
Sheila Ann Hegy
Presiding Board Member