

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

BioniCare Medical Technologies, Inc.
Docket No. A-11-26
Ruling No. 2011-3
December 2, 2010

RULING ON REQUEST TO REOPEN
DAB NO. 2338

On November 29, 2010, BioniCare Medical Technologies, Inc. (Petitioner) filed a request to reopen the Board's decision in *BioniCare Medical Technologies, Inc.*, DAB No. 2338 (2010). In DAB No. 2338, the Board affirmed the decision of Administrative Law Judge Carolyn Cozad Hughes (ALJ) sustaining a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare enrollment effective March 17, 2009. *BioniCare Medical Technologies, Inc.*, DAB CR2113 (2010) (ALJ Decision). The Board also held that the ALJ committed no error in refusing to rule on the merits of Petitioner's contention that CMS is improperly using the revocation determination to justify the denial of pre-revocation Medicare claims. The Board concluded that "the legality of CMS's payment denials is an issue beyond the scope of an appeal under the [42 C.F.R.] Part 498 procedures," and stated that "the ALJ correctly indicated that Petitioner's recourse for any improper denial of those claims is to appeal the denial through the Medicare claims appeals process established by section 1869(b) of the Social Security Act (Act), 42 U.S.C. § 1395ff(b)." DAB No. 2238, at 3-4. Finally, the Board affirmed the ALJ's holding that the revocation determination did not violate the automatic stay arising from Petitioner's bankruptcy, noting, *inter alia*, that "Petitioner never made or attempted to make a threshold showing that the revocation in itself fell within the scope of the automatic stay" and that "the issue of the stay's applicability is more properly resolved by the Bankruptcy Court." *Id.* at 5.

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).

In its request to reopen, Petitioner states that it seeks clarification of the Board's "position" on Petitioner's "challenge to CMS's improper use of the revocation process to refuse to pay" the pre-revocation Medicare claims. P. Br. at 3. Petitioner asserts that the Medicare claims appeal process does not apply because "CMS does not dispute that Medicare payment is due" for these claims. *Id.* at 5. In addition, Petitioner questions the Board's conclusion that, contrary to what Petitioner argued, 42 C.F.R. § 498.20(a)(1) does not bring the issues concerning its Medicare payment claims within the scope of the Board's review. Petitioner asks that if the Board nevertheless "believes that it, in fact, lacks the authority to address the 'improper use' issue under the Part 498 procedures," the Board "(a) state so explicitly in the Decision after reopening and (b) set forth the process that it believes BioniCare should follow to seek judicial review of this issue." P. Br. at 6. In addition, Petitioner asks that the Board "confirm that the question whether the 'improper use' issue implicates the applicability of the 'automatic stay' provisions of the Bankruptcy Code is not within the authority of the [Board] to decide under the Part 498 procedures[.]" *Id.* at 8.

Petitioner does not allege any clear error of fact or law in DAB No. 2338. For the most part, Petitioner requests that the Board simply clarify holdings in its decision, while at the same time, Petitioner acknowledges what those holdings are. Although Petitioner questions the Board's conclusion that section 498.20(a)(1) does not provide a basis for Board review of CMS's denial of pre-revocation Medicare claims, Petitioner does not point to any error in the Board's conclusion that this regulation "is merely a *notice* provision which requires CMS to inform an affected supplier in writing about the legal effect and possible consequences of an adverse initial determination under the applicable statute and regulations." DAB No. 2338, at 4 (*italics in original*).

Petitioner also alleges that "[b]ecause CMS does not dispute that Medicare payment is due for the claims at issue[,] . . . the Medicare claims process does not apply." P. Br. at 5. Petitioner does not provide any evidentiary support for the assertion that CMS does not dispute that payment is due for the claims at issue. This assertion is also inconsistent with Petitioner's previous contention that payment for these claims was denied based on the revocation. Moreover, while broadly asserting that Petitioner is not challenging any "initial determination" that is appealable under 42 C.F.R. § 405.924, Petitioner provides no analysis of why that regulation is inapplicable, and it appears that the denial of Petitioner's claims is appealable under section 405.924(b)(12). In any event, whether the Medicare claims appeal process does in fact apply is irrelevant to the issue of the ALJ's and Board's authority under 42 C.F.R. Part 498.

Accordingly, the Board denies Petitioner's request to reopen the Board Decision.

EXTENSION OF TIME FOR JUDICIAL REVIEW

Section 498.95 of 42 C.F.R. provides that an affected party that is dissatisfied with a Board decision and is entitled to judicial review must commence civil action within 60 days from receipt of the notice of the Board's decision, unless the party files a request for extension with the Board in writing before the 60-day period ends and the Board extends the time for good cause shown. On November 29, 2010, Petitioner requested that the Board extend the time for seeking judicial review of DAB No. 2338 "until 60 days after" the Board has addressed Petitioner's request for reopening.

We have determined that there is good cause for extending the time for seeking judicial review for a period of 20 days. The original deadline for commencing civil action was December 3, 2010, since the Board's records show that Petitioner received DAB No. 2338 on October 4, 2010. That deadline is now December 23, 2010, giving Petitioner has ample time to initiate judicial proceedings.

_____/s/_____
Judith A. Ballard

_____/s/_____
Constance B. Tobias

_____/s/_____
Stephen M. Godek
Presiding Board Member