

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

Hiva Vakil, M.D.
Docket No. A-12-34
Decision No. 2460
May 30, 2012

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

Integrated Medical Services (IMS), an Arizona-based physician group, appeals on behalf of Hiva Vakil, M.D. (Dr. Vakil) the October 25, 2011 decision of Administrative Law Judge (ALJ) Steven T. Kessel dismissing Dr. Vakil's request for a hearing pursuant to 42 C.F.R. § 498.70(b). *Hiva Vakil, M.D.*, DAB CR2456 (2011) (ALJ Decision). The ALJ concluded Dr. Vakil did not have a right to a hearing because the initial determination by Noridian Administrative Services, LLC (Noridian), a contractor for the Centers for Medicare & Medicaid Services (CMS), establishing Dr. Vakil's effective date of participation in Medicare became administratively final after he failed to timely request reconsideration of that determination. *Id.* at 2. For the reasons explained below, we affirm the ALJ Decision.

Statutory and Regulatory Background

The Social Security Act (Act) authorizes the Secretary of the Department of Health and Human Services to establish by regulation enrollment requirements and procedures for a supplier such as Dr. Vakil. Act § 1866(j)(1)(A).¹ Determination of the effective date of enrollment is an "initial determination" that is subject to the review procedures set forth in 42 C.F.R. Part 498. 42 C.F.R. §§ 498.3(a)(1), (b)(15). Under the review procedures in Part 498, a prospective or existing supplier "dissatisfied with an initial determination or revised initial determination related to the denial or revocation of Medicare billing privileges may request reconsideration in accordance with § 498.22(a)." 42 C.F.R. § 498.5(l)(1). The Board has stated that the right to review in section 498.5(l)(1) applies to an enrollment date determination because such a determination is similar to a denial of enrollment for the time before the enrollment date, and is therefore "related to" the denial

¹ The current version of the Act is available at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. On this website, each section of the Act contains a reference to the corresponding chapter and section in the United States Code. The Act defines a "supplier" as a "physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services under [Title XVIII]." Act § 1861(d).

of billing privileges. *Victor Alvarez, M.D.*, DAB No. 2325, at 5 (2010) (“An effective date determination resulting from the enrollment process is in essence a denial of billing privileges for a period prior to that date.”). Section 498.22(a) states that CMS or one of its contractors “reconsiders an initial determination that affects a prospective provider or supplier . . . if the affected party files a written request in accordance with paragraphs (b) and (c) of this section.” Section 498.22(b) provides, in relevant part, that the affected party may request reconsideration if the party files the request “[w]ithin 60 days from receipt of the notice of initial determination, unless the time is extended in accordance with paragraph (d) of this section.” Section 498.22(b)(3). Section 498.22(d)(1) states that a party “unable to file the request within 60 days . . . may file a written request with CMS, stating the reasons why the request was not filed timely.” CMS will extend the 60-day deadline for filing a request for reconsideration “if the affected party shows good cause for missing the deadline.” Section 498.22(d). If the affected party does not request reconsideration of an initial determination, then the initial determination is binding. Section 498.20(b).

An affected party dissatisfied with a reconsidered determination (as defined in section 498.24) may request a hearing before an ALJ. Section 498.5(1)(2). If the ALJ determines the party requesting a hearing does not have a right to a hearing, the ALJ may dismiss the hearing request. 42 C.F.R. § 498.70(b).

Case Background

The material facts of this case are undisputed. In August 2009, Dr. Vakil submitted a CMS-855I application form (885I) to Noridian and listed IMS as the group to which Dr. Vakil would be reassigning his Medicare benefits. CMS Ex. 1, at 4. Noridian notified Dr. Vakil by letter dated October 13, 2009, that he had been enrolled in Medicare as a supplier and listed his Provider Transaction Access Number (PTAN) as “Z114778 associated to billing PTAN Z108723.” CMS Ex. 2. The “billing PTAN” stated in the letter was that of IMS, which Dr. Vakil had provided in his 855I. CMS Ex. 1, at 4.

In January 2010, Dr. Vakil submitted a CMS-855R application form (885R) to reassign his Medicare benefits to a different PTAN associated with IMS. CMS Ex. 3, at 3. Dr. Vakil and IMS requested an effective date of January 1, 2010 for this reassignment of benefits. *Id.* at 2. By letter dated February 17, 2010, Noridian notified Dr. Vakil it had reassigned his Medicare benefits to IMS’s PTAN listed in the 855R with an effective date of January 1, 2010. CMS Ex. 4, at 1.

Dr. Vakil later submitted another 855R application to reassign his Medicare benefits to the PTAN Z108723, which is the same PTAN previously assigned to IMS in Noridian's October 13, 2009 letter. *See* CMS Ex. 5, at 3. However, Dr. Vakil requested an effective date of September 1, 2009 for this reassignment of benefits. *Id.* at 2. By letter dated August 10, 2010, Noridian notified Dr. Vakil it had reassigned his Medicare benefits to PTAN Z108723 with an effective date of June 13, 2010. CMS Ex. 6, at 1.

On April 20, 2011, more than six months after Noridian's initial determination of the June 13, 2010 effective date for the reassignment of Dr. Vakil's benefits, IMS submitted an "Appeal Letter" to Noridian, requesting reconsideration of that effective date. CMS Ex. 7, at 2. IMS asserted there was an error in the PTAN listed for Dr. Vakil in the original approval of his 885I application submitted in August 2009, which was discovered upon IMS receiving denials of Dr. Vakil's claims for payment. *Id.* IMS stated it was "requesting to change the effective date . . . due to the confusion of Medicare's approval letter of the 855I." *Id.* However, IMS did not request an extension of time to file the request nor did it state that good cause existed to do so. In a letter dated June 7, 2011, Noridian's hearing officer issued an unfavorable decision, stating that the "initial determination letter was August 10, 2010 and thus, this Appeal was not submitted timely." CMS Ex. 8, at 1.

IMS, on behalf of Dr. Vakil, appealed Noridian's determination to the ALJ on August 2, 2010. CMS moved to dismiss the case or for summary disposition, arguing that there were no material facts in dispute and that because Dr. Vakil "failed to timely request a reconsideration of its effective date, the August 10, 2010 determination is administratively final and not subject to further review." CMS Mot. for Dismissal or Summ. Disposition at 2. In its response to CMS's motion for summary disposition, IMS acknowledged it made "mistakes (delays) in the application process" and reiterated its contention that Noridian had erred in associating Dr. Vakil's PTAN with IMS's PTAN in the October 13, 2009 letter. *See* IMS Resp. (Civil Remedies Division Docket No. C-11-659) at 1.

The ALJ granted CMS's motion and dismissed Dr. Vakil's hearing request pursuant to 42 C.F.R. § 498.70(b). ALJ Decision at 3. The ALJ concluded that Dr. Vakil's "request for reconsideration was untimely because IMS filed its 'appeal' on Dr. Vakil's behalf more than six months after Petitioner received notice of Noridian's determination, and more than four months after expiration of the [60-day] deadline for requesting reconsideration." ALJ Decision at 2. The ALJ further concluded that: "Neither IMS nor Petitioner offered an explanation – much less a showing of good cause – for this untimely request." *Id.* Finally, the ALJ concluded that: "Absent a showing of good cause for an untimely request, the initial determination becomes administratively final, and the party who is dissatisfied with the determination forfeits his or her right to appeal it." *Id.*

Standard of Review

Our standard of review on a disputed issue of law is whether the ALJ's conclusion is erroneous. *See* Departmental Appeals Board, *Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* (Board Guidelines), at <http://www.hhs.gov/divisions/appellate/guidelines/prosopenrolmen.html>.

Analysis

IMS does not challenge the ALJ's conclusion that it was required under section 498.22(b)(3) to request reconsideration of the August 10, 2010 initial determination within 60 days, which would have been no later than October 10, 2010. IMS also does not dispute that it received the August 10 letter or that it filed Dr. Vakil's request for reconsideration on April 20, 2011, and thus did not meet the regulatory deadline for filing the request within 60 days of receiving the initial determination.² *See* 42 C.F.R. §§ 498.22(b), 498.5(l)(1). In its appeal to the Board, IMS does not explicitly argue that the ALJ erred by concluding that Dr. Vakil did not have a right to a hearing before the ALJ. Nevertheless, we shall construe the expressed disagreement with the ALJ's decision as challenging this legal conclusion.

The ALJ did not err by concluding Noridian's initial determination was "administratively final" and Dr. Vakil "has no right to a hearing inasmuch as he has no right to a reconsider[ed] determination." ALJ Decision at 2-3. Dr. Vakil's right to a reconsidered determination by Noridian, established by section 498.22(a), no longer applied once he failed to file a request for reconsideration within 60 days of receiving Noridian's initial determination and failed to show good cause for Noridian to extend the filing deadline for the request. *See* 42 C.F.R. §§ 498.22(a) (CMS or one of its contractors will review its initial determination if the requirements in paragraph (b), including the 60-day filing deadline, are satisfied), and 498.22(d)(2) (CMS will extend the filing deadline for a reconsideration request upon the affected party showing "good cause"). The lead-in language of section 498.24 limits reconsideration of an initial determination to circumstances where "a request for reconsideration has been properly filed in accordance with [section] 498.22." 42 C.F.R. § 498.24. Here, Noridian determined that Dr. Vakil did not file a reconsideration request in accordance with section 498.22. CMS Ex. 8, at 1. Noridian, therefore, did not issue a "reconsidered determination" as described by the

² Pursuant to the five-day presumption of receipt in 42 C.F.R. § 498.22(b)(3), we presume that Dr. Vakil received Noridian's initial determination on August 15, 2010, making October 14, 2010 the regulatory deadline for requesting reconsideration. Section 498.22(b)(3) states in relevant part that the "date of receipt will be presumed to be 5 days after the date on the notice unless there is a showing that it was, in fact, received earlier or later." Neither party has shown an earlier or later receipt date, so the five-day receipt presumption applies here.

regulations.³ Without a reconsidered determination by Noridian, the initial determination is “binding” and, therefore administratively final.⁴ 42 C.F.R. § 498.20(b). Moreover, the regulations plainly require that CMS or one of its contractors must issue a “reconsidered determination” before the affected party is entitled to request a hearing before an ALJ. *See* 42 C.F.R. § 498.5(1)(2) (stating that an affected party “dissatisfied with *a reconsidered determination* under paragraph (1)(1) of this section . . . is entitled to a hearing before an ALJ” (emphasis added)). Therefore, in the absence of Noridian issuing a reconsidered determination, Dr. Vakil did not have the right to a hearing before the ALJ.⁵

IMS claims for the first time on appeal that from “August 2010 to April 2011 [IMS] had also requested [Dr. Vakil’s] file from Noridian (CMS) to insure [IMS] had all of the pertinent documents to create the correct timeline and to formalize an appeal which took several months to finally obtain from them. . . .” RR at 1. However, IMS and Dr. Vakil have waived this argument (an apparent belated attempt to establish “good cause”) because they did not raise it before the ALJ despite having the opportunity to do so. *See* Board Guidelines (“The Board will not consider issues not raised in the request for review, nor issues which could have been presented to the ALJ but were not.”). Moreover, IMS does not cite any evidence in the record to support its assertion that it requested Dr. Vakil’s file from Noridian in August 2010 or that it took Noridian “several months” to provide that file.

Because Noridian determined that IMS did not meet the deadline for filing a request for reconsideration of the initial determination, Dr. Vakil no longer had the right to request reconsideration, and in turn, had no right to a hearing before the ALJ. Thus, the ALJ did not err in dismissing Dr. Vakil’s hearing request pursuant to section 498.70(b).

³ Noridian called its decision to reject Dr. Vakil’s request for reconsideration as untimely a “Provider Enrollment Reconsideration” and advised Dr. Vakil that he may appeal the decision to the ALJ. CMS Ex. 8, at 1, 3. However, Noridian’s statement does not create appeal rights for Dr. Vakil that are not otherwise authorized by regulation.

⁴ Because Noridian’s August 10, 2010 initial determination is the final administrative determination and Dr. Vakil had no right to an ALJ hearing thereon, the effective date of Dr. Vakil’s billing privileges stated in Noridian’s initial determination notice (June 13, 2010) is not subject to review and remains as stated by Noridian. We note that the ALJ Decision incorrectly states that Noridian determined the effective date to be July 12, 2010. *Compare* ALJ Decision at 2, 3 *with* CMS Ex. 6, at 1.

⁵ We do not need to address whether IMS showed “good cause” to extend the deadline for filing Dr. Vakil’s request for reconsideration. Section 498.22(d)(2) provides for an extension of time to file a request for reconsideration if CMS or the contractor determines “good cause” exists. Section 498.24 requires a reconsideration determination “[w]hen a request for reconsideration has been properly filed in accordance with [section] 498.22.” Thus, the question of whether “good cause” exists is a preliminary determination that addresses whether the request was “filed in accordance with [section] 498.22,” and is not, by itself, a “reconsidered determination” that establishes the right to a hearing before an ALJ. *See* 42 C.F.R. §§ 498.5(1)(2), 498.24.

Conclusion

For the foregoing reasons, we affirm the ALJ's dismissal of Dr. Vakil's hearing request.

_____/s/_____
Sheila Ann Hegy

_____/s/_____
Constance B. Tobias

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