

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

Axion Healthcare Services, LLC
Docket No. A-17-6
Decision No. 2783
April 13, 2017

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

Axion Healthcare Services, LLC (Axion, Petitioner) appealed an order issued by an Administrative Law Judge (ALJ) denying Axion's motion to vacate the ALJ's dismissal of Axion's request for hearing. *Axion Healthcare Services, LLC*, Order Denying Motion to Vacate, Docket No. C-16-513 (Oct. 18, 2016). The effect of the dismissal was to deny Axion, a home health agency, the opportunity to challenge the decision of the Centers for Medicare & Medicaid Services (CMS) to revoke Axion's Medicare billing privileges.

For the reasons below, we affirm the ALJ's dismissal of Axion's hearing request.

Legal Background

Title 42 C.F.R. § 498.69, titled "Dismissal for abandonment," provides:

- (a) The ALJ may dismiss a request for hearing if it is abandoned by the party that requested it.
- (b) The ALJ may consider a request for hearing to be abandoned if the party or its representative—
 - (1) Fails to appear at the prehearing conference or hearing without having previously shown good cause for not appearing; and
 - (2) Fails to respond, within 10 days after the ALJ sends a "show cause" notice, with a showing of good cause.

In addition, section 498.72 provides: "An 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 Background

On April 26, 2016, Ms. Mejia, an employee of US National Healthcare Training Services (USNHTS), filed a request for a hearing on CMS's revocation of Axion's Medicare billing privileges. The hearing request was signed by Ms. Zubia, Chief Operating Officer (COO) of USNHTS. On May 12, 2016, the ALJ issued an Acknowledgment and Pre-Hearing Order. In it, the ALJ stated that if a party appoints someone who is not an attorney to represent it, then the party must file a written notice of appointment by May 23, 2016. Acknowledgment and Pre-Hearing Order at 2 (unnumbered). The ALJ also directed CMS to file its pre-hearing exchange by June 16, 2016, and Axion to file its pre-hearing exchange by July 21, 2016. *Id.* at 3.

On May 19, 2016, Ms. Mejia filed a notice, signed by both Axion's Administrator and Ms. Zubia on May 13, 2016, appointing Ms. Zubia as Axion's representative in the matter before the ALJ. On June 16, 2016, CMS filed a motion for summary disposition and supporting exhibits. Axion did not file a response to CMS's motion nor did it file any other pre-hearing exchange. On July 27, 2016, the ALJ issued an order directing Axion to show cause no later than August 8, 2016 why its hearing request should not be dismissed for abandonment and stating that failure to file a timely response "will result in dismissal of the request for hearing." Order to Show Cause at 1. Axion did not file a response to this order. On August 16, 2016, the ALJ dismissed Axion's appeal pursuant to 42 C.F.R. § 498.69. The ALJ concluded that since Axion had not responded to the order to show cause, Axion had abandoned its hearing request. The ALJ also notified the parties that they "may request that an order dismissing a case be vacated pursuant to 42 C.F.R. § 498.72." Dismissal at 2.

On October 17, 2016, Ms. Mejia filed a letter, signed by Axion's Administrator on the same date, requesting that the ALJ vacate the dismissal because Axion's appointed representative, Ms. Zubia, "failed to notify Axion Healthcare Services, LLC prior to leaving the company of any outstanding hearings and motions that were to be filed according to the directives by the ALJ." Axion further stated that as soon as it became aware of the dismissal, it filed its motion to vacate the dismissal. Axion acknowledged that "there was a dent in communication and failure to follow up," but stated that it "did not intentional[ly] abandon the case."

The ALJ denied Axion's motion, stating in part as follows:

Petitioner has not stated good cause for me to vacate the dismissal order I used in this case. Petitioner has not explained when Ms. Zubia ceased to represent it or when she left her company. Petitioner has not explained why another individual from Ms. Zubia's firm, such as the individual whose DAB E-file account was used to file documents in this case, including Petitioner's motion to vacate, Dr. Kevin [Simms], was not responsible for monitoring any filings in this case. Finally, the "dent in communications" that Petitioner identifies (Motion to Vacate at 1) as the reason that it did not respond to the Order to Show Cause I issued is not good cause for me to vacate the dismissal.

Order Denying Motion to Vacate at 2.¹ Axion timely filed a request for review with the Board that was almost identical to the document the ALJ accepted as a motion to vacate her dismissal order.

DAB E-File, to which the ALJ's order refers, is the Departmental Appeals Board's (DAB's) electronic filing system. A party or its representative must have a DAB E-File account in order to file and receive appeal-related submissions. A person registering for an account must provide an e-mail address which will be used to login to DAB E-File. When a document is uploaded by a party or the DAB, DAB E-File automatically sends a notice to that e-mail address, and to any secondary e-mail address provided during the registration process, stating that a new document has been uploaded to the case. DAB E-File also automatically sends this notice to the e-mail address of any other registered user provided at the time a hearing request is filed. *See* https://dab.efile.hhs.gov/appeals/to_crd_instructions?locale=en.

Analysis

We note preliminarily that the Board has previously ruled that an ALJ may reasonably construe a petitioner's failure to file a prehearing document as tantamount to failure to appear for a prehearing conference or hearing as specified in section 498.69(b)(1). *See, e.g., Osceola Nursing & Rehab. Ctr.*, DAB No. 1708 (1999). Axion does not argue otherwise. Thus, the ALJ had authority under section 498.69 to dismiss Axion's hearing request for abandonment if Axion failed to file its prehearing exchange and did not respond to the ALJ's order to show cause for that failure. The Board reviews an ALJ's

¹ The order incorrectly refers to Dr. Kevin West instead of Dr. Kevin Simms. According to the Departmental Appeals Board's Civil Remedies Division (which provides support for the ALJs), Kevin Simms filed Axion's hearing request and subsequent documents with the ALJ, but Ms. Mejia had access to his DAB E-File account and subsequently replaced his name with hers. *See* Civil Remedies Division e-mail dated 3/15/17 re Notice of Request for Documents.

dismissal for abandonment under an abuse of discretion standard. *See, e.g., Meridian Nursing & Rehab at Shrewsbury*, DAB No. 2504, at 7 (2013) (“The Board has long recognized that where the regulation states that an ALJ ‘may’ dismiss, dismissal is an exercise of discretion and reviewable as such.”). The Board has applied the same standard to an ALJ’s denial of a request to vacate such a dismissal. *Id.* at 8. However, the standard of review of a factual finding underpinning the ALJ’s exercise of discretion is whether the ALJ decision is supported by substantial evidence in the record as a whole. *Id.* at 8; *Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* (available at <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html>).

We conclude that the ALJ did not abuse her discretion in dismissing Axion’s hearing request for abandonment and finding that Axion did not show “good cause” to vacate the dismissal.² No definition of ‘good cause’ appears in the Part 498 regulations, and the Board has not attempted to set out an authoritative or complete definition of that term. Here, as in prior cases, we need not do so because we conclude that “no reasonable definition of ‘good cause’ encompasses the lapses” for which Axion or its representatives are responsible. *Brookside Rehab. & Care Ctr.*, DAB No. 2094, at 7 n.7 (2007) (holding that there was no good cause for extending deadline for filing hearing request).

In its motion, Axion did not dispute that it did not file its prehearing exchange or timely respond to the ALJ’s order to show cause why the hearing request should not be dismissed for abandonment. Axion maintained only that the ALJ’s dismissal should be vacated because Axion’s representative, Ms. Zubia, “left the company” without notifying Axion of the ALJ’s order that it file a prehearing exchange by July 21, 2016. However, Axion did not document, much less allege, that Ms. Zubia left USNHTS before Axion’s prehearing exchange was due. Moreover, even assuming that Ms. Zubia left USNHTS without informing Axion of an outstanding filing deadline, substantial evidence in the record supports the ALJ’s finding that another individual from USNHTS had a DAB E-File account and could have “monitor[ed] any filings in this case” in Ms. Zubia’s absence (Order Denying Motion to Vacate at 2).

² Since Axion did not file a response to the ALJ’s order to show cause, the question of whether the ALJ abused her discretion in dismissing the hearing request arises only because Axion moved to vacate the dismissal.

The last page of the ALJ's order to show cause shows that it was being served on Axion via DAB E-File at three e-mail addresses: ksimms@usnhts.com, axion_hes@yahoo.com, mzubia@usnhts.com. When that order was uploaded to DAB E-File, e-mail notifications were automatically sent to ksimms@usnhts.com and mzubia@usnhts.com.³ See Civil Remedies Division e-mail dated 3/15/17 re Notice of Request for Documents.⁴ Dr. Simms would not have received an automatic e-mail from DAB E-File unless he or Ms. Mejia had provided his e-mail address to DAB E-File in connection with this case. In addition, we can infer from the fact that the e-mail address ksimms@usnhts.com appears on USNHTS's letterhead on a letter dated May 13, 2016 and an undated letter accompanying Axion's October 27, 2017 appointment of representative form for Axion's appeal to the Board that Dr. Simms worked for USNHTS in some official capacity throughout the relevant time period. Thus, notice of the order to show cause to Dr. Simms constituted adequate notice to Axion even if its appointed representative was no longer employed at USNHTS. Under these circumstances, it was not unreasonable, much less an abuse of discretion, for the ALJ to find that there was no good cause for vacating the dismissal.

We are mindful of the fact that, in affirming the ALJ's exercise of discretion to dismiss this case, we are foreclosing Axion's right to review of CMS's revocation of its Medicare billing privileges based on the omissions of USNHTS and its employees. However, as the Board has previously stated, we have an "overarching responsibility to ensure the efficiency and integrity of proceedings before the Departmental Appeals Board as a whole, which encompasses a concern that the orders of ALJs not be disregarded by counsel without consequence." *Meridian* at 12, citing *Guardian Care Nursing & Rehab. Ctr.*, DAB No. 2260, at 21 (2009). Although USNHTS is not a law firm, and Ms. Zubia did not hold herself out as counsel, the same concern about the integrity of ALJ orders applies to any entity that undertakes to represent a party. Moreover, this is not a situation in which Axion disavowed the actions of its representative. To the contrary, the motion to vacate the ALJ's dismissal was signed by Axion's administrator and filed by Ms. Mejia. We also note that after Axion requested Board review of the ALJ's denial of its request to vacate the dismissal, Axion chose USNHTS's new COO, Ms. Mejia, to represent it. See Appointment of Representative dated 10/27/16 and accompanying undated letter from Ms. Mejia (stating that "US National Health Care Training Services, Will Be representing AXXION Healthcare Services LLC").

³ The automatic e-mail notification was also sent to a private e-mail address for Dr. Simms. *Id.*

⁴ There is no record of any automatic e-mail notification to axion_hes@yahoo.com. It appears that there is a typographical error in this e-mail address, since there is a slightly different e-mail address on Axion's letterhead. Letter dated 10/17/16 (Axion's motion to vacate).

Conclusion

For the foregoing reasons, we uphold the ALJ's dismissal of Axion's hearing request for abandonment.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Susan S. Yim
Presiding Board Member