

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

Allan Young, D.O.
Docket Nos. A-17-94, A-17-95
Decision No. 2847
February 5, 2018

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

Allan Young, D.O. (Petitioner) seeks review of an Administrative Law Judge (ALJ)'s orders dismissing two hearing requests purportedly filed on behalf of Petitioner, who seeks an effective date of Medicare enrollment and billing privileges earlier than the date the Centers for Medicare & Medicaid Services (CMS) assigned. *Allan Young, D.O., Orders Dismissing Case*, Civil Remedies Docket Nos. C-17-688 and C-17-689 (June 27, 2017) (ALJ Orders). The ALJ dismissed each hearing request under 42 C.F.R. § 498.70(b) as having been filed by an individual who is not a proper party because in each case Petitioner failed to file a signed notice of appointment authorizing representation in compliance with 42 C.F.R. § 498.10(b) and the ALJ's orders.

As we explain below, Petitioner's requests for review of the ALJ Orders on their face provide no basis for Board review because they do not "specify the issues, the findings of fact or conclusions of law with which [Petitioner] disagrees, and the basis for contending that the findings and conclusions are incorrect," as required under 42 C.F.R. § 498.82(b). Moreover, Petitioner does not address why he did not or could not comply with 42 C.F.R. § 498.10(b) and the ALJ's orders, let alone specifically argue that the ALJ abused her discretion in dismissing his requests for hearing under 42 C.F.R. § 498.70(b). Accordingly, there is no issue for the Board to review and no basis for disturbing the ALJ Orders. We therefore sustain the ALJ Orders. As the ALJ Orders are substantively similar, we issue one decision encompassing both cases.

Legal Background

The regulations governing appeals of CMS determinations relating to participation in the Medicare program, at 42 C.F.R. Part 498, permit a Medicare provider or supplier that has been granted enrollment in Medicare to appeal, to an ALJ, CMS's "reconsidered determination" of the effective date of enrollment. 42 C.F.R. §§ 498.3(b)(15), 498.5(l)(2); *Victor Alvarez, M.D.*, DAB No. 2325 (2010). A party such as a provider or

supplier seeking ALJ review of CMS’s determination (or subsequent Board review) “may appoint as its representative anyone not disqualified or suspended from acting as a representative in proceedings before the Secretary [of Health and Human Services] or otherwise prohibited by law.” 42 C.F.R. § 498.10(a). However, “[i]f the representative appointed is not an attorney, the party must *file written notice of the appointment* with CMS, the ALJ, or the Departmental Appeals Board.” *Id.* § 498.10(b) (emphasis added).¹

The regulations, under the heading “Dismissal for cause,” state that “the ALJ may dismiss a hearing request either entirely or as to any stated issue, under any of the following circumstances” including “[t]he party requesting a hearing is not a proper party or does not otherwise have a right to a hearing.” *Id.* § 498.70(b).

A party whose hearing request is dismissed by the ALJ may request that the ALJ vacate his or her dismissal order, and may also appeal the dismissal order to the Board. *Id.* §§ 498.72, 498.80. The ALJ’s “dismissal of a request for hearing is binding unless it is vacated by the ALJ or the Departmental Appeals Board.” *Id.* § 498.71(b).

Background and ALJ Orders

The following background information is from the ALJ Orders, the records in the two cases before the ALJ, and Petitioner’s requests for review of the ALJ Orders. Petitioner’s requests for review do not dispute any statements in the ALJ Orders.

On May 9, 2017, the Civil Remedies Division received two requests for ALJ hearings (RFHs) purportedly filed on Petitioner’s behalf. ALJ Orders at 1. One request was submitted on letterhead for Universal Vascular Center (Universal) and, the other, on letterhead for A & V [Arteries & Veins] Doctors, PLLC (A & V). ALJ Orders at 1; RFHs. An individual who identified herself as the “Billing Manager” (initials CH) signed both requests. ALJ Orders at 1; RFHs.

The ALJ Orders note that the CMS contractor’s reconsidered determinations “suggest[] that Dr. Young may have a right to a hearing” but “do[] not address any right of” Universal, A & V, or CH to request a hearing, and that “[p]ursuant to 42 C.F.R. § 498.10(b), only an aggrieved party or a properly appointed attorney or representative of an aggrieved party may file a request for hearing or represent the aggrieved party in proceedings before an administrative law judge.” ALJ Orders at 1. Thus, on May 25, 2017, the ALJ issued Acknowledgment and Pre-Hearing Orders (Pre-Hearing Orders)

¹ If the representative appointed is an attorney, “the attorney’s statement that he or she has the authority to represent the party is sufficient.” 42 C.F.R. § 498.10(c).

requiring Petitioner to file, by June 5, 2017, a signed notice of appointment authorizing CH to represent him and notifying Petitioner that if the ALJ did not receive confirmation of CH's authority to act for Petitioner, the hearing requests could be dismissed "pursuant to 42 C.F.R. § 498.70(b), as having been filed by an individual who is not a proper party." *Id.*; Pre-Hearing Orders at 2.

On June 5, 2017, in each case, CH and a physician (initials EA) each filed a letter signed by EA. In those two letters, EA represented that he was the "Authorized Official" and "CEO" of A & V and Universal and referred to CH as the "delegated official" for A & V and Universal. In one letter (C-17-688), EA stated that CH, his "Delegated Official for Universal Vascular Center," will represent Dr. Young at the hearing before the ALJ. In the other letter (C-17-689), EA stated that he, EA, as the "Authorized Official and CEO of A & V Doctors, PLLC," will represent Dr. Young at the hearing. The ALJ found that the letters were "not responsive to the instructions in [her] Prehearing Order[s]" and that "[n]either Dr. Young nor [CH] filed a proper notice of appointment of representative by June 5, 2017, the deadline set in [her] Prehearing Order[s]." ALJ Orders at 1.

Thus, on June 7, 2017, the ALJ issued an Order to File Appointment of Representative and to Show Cause (Show Cause Orders) in each case, ordering Petitioner to "file a written and signed appointment of representative as required by 42 C.F.R. § 498.10" by June 20, 2017. Show Cause Orders at 2. The Show Cause Orders also stated that, "[a]lternatively, Dr. [EA] or [CH] must show cause why this matter should not be dismissed pursuant to 42 C.F.R. § 498.70(b)" and that "[a]ny response by Dr. [EA] or [CH] must demonstrate that they, or [Universal and A & V], have a right to a hearing independent of Dr. Young. **If no response is received, I will dismiss this case.**" *Id.* (bold in original).

No one responded to the ALJ's Show Cause Orders by the June 20, 2017 deadline, and so on June 27, 2017, the ALJ dismissed both requests for hearing, finding that "at no time has Dr. Young filed a document designating [CH] or Dr. [EA] as his representative as required by 42 C.F.R. § 498.10" and "conclud[ing] that the purported hearing request filed by [CH] is invalid to invoke Dr. Young's right to a hearing" because "there is no indication that [CH] or Dr. [EA] is authorized to represent Dr. Young[.]" ALJ Orders at 2. The ALJ moreover noted that neither CH nor Dr. EA presented any argument that either of them, or A & V or Universal, has a right to a hearing independent of Dr. Young. *Id.*

Standard of Review

The standard of review for disputed issues of law is whether the ALJ decision is erroneous. The standard of review for disputed issues of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. *See Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or*

Supplier's Enrollment in the Medicare Program (Guidelines), available at <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html>.

Discussion

Petitioner fails to allege any error by the ALJ or articulate any disagreement with the ALJ Orders or ALJ proceedings and, accordingly, provides no issue for the Board to review and no basis for disturbing the ALJ Orders.

The central question before the Board is whether Petitioner has filed a request for review providing a basis to vacate the ALJ Orders. As the ALJ Order advised Petitioner, a request for review by the Board of an ALJ order or dismissal is required by regulation to “specify the issues, the findings of fact or conclusions of law with which the party disagrees, and the basis for contending that the findings and conclusions are incorrect.” ALJ Orders at 3, citing 42 C.F.R. § 498.82(b).

Petitioner filed with the Board two requests for review of the ALJ Orders, one on Universal letterhead (Docket No. A-17-94), and one on A & V letterhead (Docket No. A-17-95). In the former, intended as an appeal of the ALJ’s dismissal order in docket number C-17-688, Petitioner stated he was “providing a written statement to allow [CH] to represent [him] concerning the appeal and review” and that “[b]oth Dr. [EA], who is the authorized official and CEO of Universal Vascular Center, PLLC, and [CH] have provided written statements regarding representation for the purpose of a hearing and review.” In the latter, Petitioner stated that the ALJ “dismissed the request for a hearing due to non-receipt of a written statement from me to authorize Dr. [EA] to represent me in any hearings or review related to this docket number, C-17-689” and asked the Board to “accept [his] written statement to have Dr. [EA]” act as his authorized representative.

Petitioner’s requests for review do not identify or allege any error of fact or law in the ALJ Orders, or at any point in the ALJ proceedings. They simply state that the ALJ dismissed both requests for hearing and that Petitioner is providing a written statement to the Board to allow CH to represent him in one case, and EA to represent him in the other. As such, the requests for review are not valid inasmuch as they do not meet the content requirements for a request for review under 42 C.F.R. § 498.82(b).

Instead of alleging any error of fact or law, Petitioner now merely seeks another opportunity to correct his noncompliance with 42 C.F.R. § 498.10(b), which he repeatedly failed to correct before the ALJ despite multiple opportunities to do so and clear advance notice of the consequences for failing to do so.

After first failing to file hearing requests that complied with 42 C.F.R. § 498.10, Petitioner then failed to follow the ALJ's instructions in her Pre-Hearing Orders that "[i]f a party appoints someone who is not an attorney" as its representative, "then the party must file a written notice of appointment with the CRD by **June 5, 2017.**" Pre-Hearing Orders at 2 (bold in original), citing 42 C.F.R. § 498.10(b). The Pre-Hearing Orders, moreover, informed Petitioner that he "must file a signed notice of appointment authorizing [CH] to represent him" if CH "is acting as Petitioner's representative in this proceeding," and notified Petitioner that "[i]f I do not receive confirmation of [CH's] authority to act for Petitioner in accordance with this paragraph, I may dismiss the hearing request pursuant to 42 C.F.R. § 498.70(b), as having been filed by an individual who is not a proper party." *Id.* Instead, CH and EA each uploaded to DAB E-File a letter from EA, which did not meet the requirements of the regulation or the Pre-Hearing Orders for the same reason that the Pre-Hearing Orders noted of the original hearing requests: they were *not* from Petitioner, and the record lacked any indication that either CH or EA was authorized to represent Petitioner or had a right to request a hearing independent of Petitioner.

Petitioner also failed to respond to the ALJ's Show Cause Orders that gave Petitioner another chance to file the required notices of representation and clearly stated that the ALJ "**will dismiss**" each hearing request if Petitioner does not respond. Show Cause Orders at 2 (bold in original).

The Board has stated that "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 [. . .] without consequence.'" *Sunview Care & Rehab Ctr., LLC*, DAB No. 2713, at 11 (2016), citing *Meridian Nursing & Rehab at Shrewsbury*, DAB No. 2504, at 12 (2013), *aff'd*, *Meridian Nursing & Rehab at Shrewsbury v. CMS*, 555 F. App'x 177 (3rd Cir. 2014), quoting *Guardian Care Nursing & Rehab. Ctr.*, DAB No. 2260, at 21 (2009). While *Sunview* also noted that the Board "has been reluctant to permit dismissal and loss of hearing rights where an ALJ has not provided clear directive or provided sufficient opportunities to explain or cure noncompliance," *id.*, citing *Chateau Nursing & Rehab. Ctr.*, DAB No. 2427, at 8-11 (2011), that concern is not presented here. As discussed, in each case, the ALJ clearly told Petitioner to file the required notices of representation and notified Petitioner of the consequences for failing to do so. As in *Sunview*, the ALJ gave Petitioner "ample opportunity" to comply with the ALJ's orders and "clearly explain[ed] what was required of [p]etitioner and the possible consequences for failure to comply." *Sunview* at 11. Petitioner nonetheless failed to comply with the ALJ's orders.

As noted above, Petitioner has, on appeal, attempted to cure his failure to meet the requirements of 42 C.F.R. § 498.10(b) by designating, in the requests for review, CH and EA as his representatives. What Petitioner is seeking to do here is thus not to dispute the ALJ's findings of fact or conclusions of law but, rather, to try to correct before us the

noncompliance with subsection 498.10(b) that he did not correct before the ALJ, even though the ALJ gave Petitioner multiple opportunities to do so. That is not something the Board may do. The Board's function under the regulations is to review ALJ decisions and orders, not to give litigants who fail repeatedly to comply with ALJ orders to file hearing requests that comply with the regulations another chance to correct that noncompliance.

In addition to not identifying any ALJ findings of fact or conclusions of law with which he disagrees, Petitioner has identified no basis for us to vacate the ALJ dismissals. *See, e.g., Sunview* at 9 (in reviewing an ALJ's exercise of discretion, the Board "will consider only whether the [ALJ] has articulated a reasonable basis for the decision under review, not whether it was the only reasonable decision"). We conclude that the basis for dismissal articulated by the ALJ here was reasonable in light of the repeated failures of the Petitioner to comply with the regulations and her orders.

Conclusion

For the reasons stated above, we affirm the ALJ Orders. The dismissals are binding. 42 C.F.R. § 498.71(b) ("The dismissal of a request for hearing is binding unless it is vacated by the ALJ or the Departmental Appeals Board.")²

_____/s/
Sheila Ann Hegy

_____/s/
Leslie A. Sussan

_____/s/
Susan S. Yim
Presiding Board Member

² The ALJ notified Petitioner that he may ask the ALJ to vacate her dismissal orders pursuant to 42 C.F.R. § 498.72. ALJ Orders at 2. There is no indication that Petitioner asked the ALJ to vacate her dismissal orders within 60 days from the date of receipt of the notice of dismissal. 42 C.F.R. § 498.72. Petitioner instead elected to ask the Board to review the ALJ Orders.