

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

ORDER OF MEDICARE APPEALS COUNCIL
DISMISSING REQUEST FOR REVIEW
Docket Number: M-11-443

In the case of

Claim for

A.L.

Hospital Insurance Benefits
(Part A)

(Appellant)

**** (deceased)

(Beneficiary)

(HIC Number)

Medicare Secondary Payer
Recovery Contractor

(Contractor)

(ALJ Appeal Number)

The Administrative Law Judge (ALJ) issued an Order of Dismissal dated October 5, 2010. The ALJ dismissed the request for an ALJ hearing because the appellant withdrew her request for ALJ hearing.¹ David A. Azran, Esq., has asked the Medicare Appeals Council (Council) to review this action on behalf of the appellant.² The request for review is entered into the record as Exhibit (Exh.) MAC-1.

The Council may dismiss a request for review when the party requesting review does not have a right to review by the Council, or if certain other criteria apply. 42 C.F.R. § 405.1114.

¹ Designation as appellant in this action does not convey standing to appeal.

² As explained in more detail below, the appellant has not demonstrated that she is a proper party. Without this, she lacks capacity to appoint a representative with respect to the deceased beneficiary's rights or the rights of any successor taking under state law. Notice of this action is therefore mailed only to the appellant, and not to her purported counsel.

This matter concerns Medicare's claim as secondary payer for recovery of a conditional payment made on behalf of the beneficiary. The beneficiary died on June 19, 2010, after requesting a hearing. Attorney David A. Azran advised the Office of Medicare Hearings and Appeals (OMHA), in a letter dated July 7, 2010, that he was working to determine who may have a legal interest in the claim following the beneficiary's death. Exh. 16, at 1. Further, Mr. Azran advised that he would file the form HHS-722, to substitute a party upon the death of a party, with OMHA when that person was identified. *Id.*

The ALJ hearing was originally scheduled for August 4, 2010. Exh. 14, at 1. During this telephone communication, Mr. Azran explained that the beneficiary's father was her heir. Hearing CD. He went onto inform the ALJ that the father was incapacitated and that his daughter (the appellant) had power of attorney, so she would be handling matters. *Id.* Mr. Azran stated that the daughter is the sister of the decedent applicant. *Id.* However, during that telephone communication the ALJ informed Mr. Azran that she could not go forward with the hearing until she received a substitution of party form and an appointment of representative form. *Id.*

Mr. Azran submitted an appointment of representative form, signed by the beneficiary's sister, Ms. A*** L***, in a letter dated August 16, 2010. Exh. 20, at 1, 3. The form indicates that the appellant is a "sibling of the decedent beneficiary, with power of attorney by heir to beneficiary." The OMHA then advised Mr. Azran in an August 18, 2010, letter that the submitted appointment of representative form was inadequate. Exh. 21, at 2. Further, this letter stated that first Ms. L*** would need to complete the "Request for Substitution of Party Upon Death of Party form", which is form HHS-722, and then appoint Mr. Azran as her representative. *Id.*

Mr. Azran included an appointment of representative form, as well as form HHS-722, in a letter dated September 1, 2010. Exh. 22, at 1-3. On form HHS-722, Ms. L*** had checked the box stating "I do not wish to proceed with the hearing requested by the deceased, and I withdraw the request for hearing." *Id.* at 2. A September 1, 2010, facsimile message from OMHA to Mr. Azran advised him that the appointment of representative form was not properly completed. Exh. 23, at 3.

A letter from OMHA to Ms. L***, dated September 27, 2010, explained that OMHA had not received a valid appointment of representative form and that the HHS-722 form received by OMHA requested withdrawal of the appeal. Exh. 25, at 1. The letter informed Ms. L*** that if she did want to pursue the appeal she needed to contact OMHA by October 4, 2010, or the appeal would be dismissed. *Id.* The ALJ determined that Ms. L*** did not wish to pursue this appeal, as that was indicated on form HHS-722. Order at 4.

Before the Council, Mr. Azran contends that "[t]he ALJ's dismissal order is based on the Appellant's erroneous filing of form HHS-772...." Exh. MAC-1. Further, Mr. Azran states that "the appellant was operating on erroneous facts and/or assumptions based on the MSPRC's representation regarding their treatment and consideration of Appellant's Request for Compromise...and regarding the issue of whether or not Medicare is entitled to interest on the principal claimed amount." *Id.* Included in the appellant's request for review is a "Declaration of A*** L***", which further explains her understanding and belief, which is apparently based directly on the advice of counsel. In the Declaration, Ms. L*** represents that she is a proper appellant as the beneficiary's sister because she holds the power of attorney for D*** D***, the beneficiary's father.

The record reflects that the ALJ painstakingly undertook to have Ms. L*** perfect her substitute party standing, and appoint Mr. Azran as her attorney. Ms. L*** checked a block on form HHS-722, which stated "I have attached evidence of my legal authority to act on behalf of the deceased appellant." Exh. 25, at 2; Exh. 22, at 2. However, the power of attorney from Mr. D*** to Ms. L*** has never been submitted. There is also no evidence in the record that D*** D*** has an interest in the estate under state law. Thus, Ms. L*** has not demonstrated that she is authorized to act on behalf of a proper party, or otherwise has any interest as a substitute party.

The Medicare Appeals Council therefore dismisses the request for review pursuant to 42 C.F.R. § 405.1114(c)(1), as the appellant has not demonstrated a financial interest. The reconsideration, dated March 23, 2010, is binding.

The Council will vacate this order if the Council receives satisfactory evidence within 30 days that the appellant is authorized to act on behalf of a proper party, or otherwise has any financial interest as a substitute party.

MEDICARE APPEALS COUNCIL

/s/ Clausen J. Krzywicki
Administrative Appeals Judge

Date: January 21, 2011