

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

J. Jerry Rodos, D.O.

(NPI: 1568537017)

(PTANs: 201639, 35960001, 713160, 910390, 910391, IL1801001, K49969)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-100

Decision No. CR4506

Date: January 14, 2016

DECISION DISMISSING CASE

The request for hearing of Petitioner, J. Jerry Rodos, D.O., is dismissed pursuant to 42 C.F.R. § 498.70(a) and (b).

I. Procedural History

Wisconsin Physicians Service Insurance Corporation (WPS), a Medicare contractor, mailed Petitioner a letter dated June 14, 2011, notifying Petitioner of the initial determination to revoke his Medicare enrollment and billing privileges effective September 29, 2008. WPS cited as grounds for the revocation that Petitioner was terminated from participation in the Illinois Medicaid program due to healthcare fraud. WPS imposed a three-year re-enrollment bar that ran from the effective date of revocation. The notice informed Petitioner that he had a right to reconsideration by a contractor hearing officer and that a written request for reconsideration had to be filed within 60 calendar days of the postmark of the WPS initial determination letter. Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 1 at 6-7.

There is no dispute that Petitioner did not request reconsideration of the June 14, 2011 WPS initial determination within 60 days. Petitioner asserts that he did not receive the

initial determination until the end of 2014, and then it was received by Petitioner from an unspecified third party. Request for Hearing (RFH) at 2-3, 5 (Petitioner's Affidavit dated October 30, 2015). Counsel for Petitioner admits that it was not until April 17, 2015, that the request for reconsideration of the June 14, 2011 initial determination was filed. RFH at 2; CMS Ex. 1 at 1-2. Petitioner admits that he received the June 14, 2011 initial determination in late 2014, which would put the receipt date on or before December 31, 2014. Counsel admits that the request for reconsideration was not filed until April 17, 2015. Therefore, the request for hearing was filed at least 108 days after Petitioner admitted he received the June 14, 2011 initial determination.

It is also undisputed that on June 3, 2015, National Government Services (NGS), the current Medicare contractor, issued a reconsidered determination related to Petitioner's April 17, 2015 request for reconsideration. The June 3, 2015 reconsidered determination, which was subsequently vacated, is mentioned by both parties but neither has offered the document for my consideration as evidence.

NGS notified Petitioner by letter dated September 1, 2015, that it reopened its reconsidered determination dated June 3, 2015, and that it was issuing a revised reconsidered determination. NGS advised Petitioner that on reopening, it determined that Petitioner's April 17, 2015 request for reconsideration was untimely. Therefore, NGS determined that the June 14, 2011 WPS initial determination was final and binding. NGS vacated the June 3, 2015 reconsidered determination and denied reconsideration of the initial determination because Petitioner's request for reconsideration was untimely.¹

On November 8, 2015, Petitioner requested review by an administrative law judge (ALJ). The case was assigned to me for hearing and decision. I issued an Acknowledgment and Prehearing Order on November 24, 2015.

On December 11, 2015, CMS filed a motion to dismiss with CMS Exs. 1 and 2. Petitioner responded to the CMS motion on December 29, 2015. Petitioner did not object to my consideration of CMS Exs. 1 and 2 and they are admitted as evidence.

II. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Payment under the program for services rendered to Medicare-eligible

¹ A copy of this letter was also not offered as evidence by either party but a copy was filed with the request for hearing and is part of the record for decision. Departmental Appeals Board Electronic Filing system Item #1a.

beneficiaries may only be made to eligible providers of services and suppliers.² Act §§ 1835(a) (42 U.S.C. § 1395n(a)); 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Administration of the Part B program is through contractors such as WPS and NGS. Act § 1842(a) (42 U.S.C. § 1395u(a)).

The Act requires the Secretary of Health and Human Services (the Secretary) to issue regulations that establish a process for the enrollment of providers and suppliers, including the right to a hearing and judicial review of certain enrollment determinations. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to sections 1866(h)(1) and (j)(8) of the Act, a provider or supplier whose enrollment application or renewal application is denied is entitled to an administrative hearing and judicial review. The Secretary has promulgated regulations that provide for administrative and judicial review. Pursuant to 42 C.F.R. § 424.545(a), a provider or supplier denied enrollment in Medicare or whose Medicare enrollment and billing privileges are revoked has the right to administrative and judicial review in accordance with 42 C.F.R. pt. 498. Appeal and review rights are specified by 42 C.F.R. § 498.5.

A prospective or existing provider or supplier dissatisfied with an initial determination or revised initial determination to deny or revoke Medicare enrollment and billing privileges – an “affected party” – is granted the right to request reconsideration. 42 C.F.R. §§ 498.5(l), 498.22(a). The request for reconsideration must be filed with CMS, either directly by the affected party or a designated representative, within 60 days of receipt of the notice of the initial determination. 42 C.F.R. § 498.22(b). The regulation requires that CMS extend the time for filing a request for reconsideration if the affected party shows good cause for missing the 60-day deadline. 42 C.F.R. § 498.22(d). The date of receipt of the initial determination is presumed to be five days after the date on the notice from CMS or its contractor, unless there is a showing that it was received earlier or later. 42 C.F.R. § 498.22(b)(3). If a request for reconsideration is properly filed in accordance with 42 C.F.R. § 498.22, CMS makes a reconsidered determination, affirming or

² Petitioner is a “supplier” under the Act and the regulations. A “supplier” furnishes services under Medicare and the term “supplier” applies to physicians or other practitioners and facilities that are not included within the definition of the phrase “provider of services.” Act § 1861(d) (42 U.S.C. § 1395x(d)). A “provider of services,” commonly shortened to “provider,” includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, and a fund as described in sections 1814(g) and 1835(e) of the Act. Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

modifying the initial determination. 42 C.F.R. § 498.24(c). CMS, a CMS contractor, or an affected party who is dissatisfied with a reconsidered determination or a revised reconsidered determination has a right to a hearing before an ALJ. 42 C.F.R. § 498.5(l)(2).

III. Findings of Fact and Conclusions of Law

My conclusions of law are set forth followed by the pertinent findings of fact and analysis.

A. Petitioner has no right to a hearing before an ALJ because the June 3, 2015 reconsidered determination was reopened and vacated on September 1, 2015, and reconsideration of the initial determination was denied as untimely requested.

B. Dismissal pursuant to 42 C.F.R. § 498.70(a) and (b) is appropriate.

CMS argues that Petitioner's request for hearing should be dismissed pursuant to 42 C.F.R. § 498.70(a). The regulation provides that I may dismiss a request for hearing for cause when a prior determination on the same issue has become final because the affected party did not timely request reconsideration. 42 C.F.R. § 498.70(a). In this case, the June 14, 2011 WPS initial determination became final and binding when Petitioner failed to timely request reconsideration. The regulations provide that an initial determination is binding, unless it is reconsidered or reopened and revised pursuant to 42 C.F.R. § 498.32. 42 C.F.R. § 498.20(b)(1), (3). CMS argues that the June 3, 2015 NGS reconsidered determination had no effect because it was reopened and vacated by NGS on September 1, 2015.

CMS is authorized to reopen most initial or reconsidered determinations within 12 months of the date an affected party is notified of the initial or reconsidered determination. 42 C.F.R. § 498.30. The NGS reconsidered determination was dated June 3, 2015, and pursuant to 42 C.F.R. §§ 498.22(b)(3) and 498.40(a)(2), that notice was presumed to be delivered to Petitioner on or about June 8, 2015, five days after the date on the notice. The September 1, 2015 NGS action to reopen and revise the June 3, 2015 reconsidered determination was well within the 12 months authorized for reopening reconsidered determinations in a case such as Petitioner's. Upon reopening, NGS determined that Petitioner had not requested reconsideration within 60 days and had failed to state good cause for missing the deadline to require CMS to extend the deadline. 42 C.F.R. § 498.22(d)(2). Therefore, NGS vacated the June 3, 2015 reconsidered determination. The term "vacate" in a legal context such as this, means to "nullify or cancel; make void; invalidate." Black's Law Dictionary 1584 (8th ed. 2004). NGS then denied reconsideration because the request was untimely. The facts support a conclusion that Petitioner's request for reconsideration was not filed within 60 days, whether the 60-

day period began with presumed receipt of the notice of initial determination five days after June 14, 2011 or December 31, 2014, which was about the time Petitioner admits receiving a copy of the initial determination from a third party. Petitioner concedes that he did not state good cause for failing to file a request for reconsideration before April 17, 2015. Petitioner states in his affidavit filed with his request for hearing that he intentionally delayed requesting reconsideration after he received a copy of the June 14, 2011 initial determination on or before December 31, 2014. The vacation of the June 3, 2015 reconsidered determination and the denial of the request for reconsideration on September 1, 2015 is, therefore, consistent with and supported by the facts and law. 42 C.F.R. § 498.32.

Petitioner argues in response to the motion to dismiss that there was good cause for an extension of the 60-day period for Petitioner to request reconsideration. Petitioner's arguments are not grounds for relief, however, as Petitioner has no right to review based on the vacated reconsidered determination or the NGS denial of reconsideration. The regulations clearly provide Petitioner a right to ALJ review only when there is a reconsidered determination or a revised reconsidered determination. 42 C.F.R. § 498.5(l)(2). In this case, the June 3, 2015 reconsidered determination was vacated and the request for reconsideration was denied. Thus, there is no reconsidered determination within the meaning of 42 C.F.R. §§ 498.5(l)(2) or 498.24, and no right to ALJ review. Petitioner cites no statutory or regulatory provision that grants a right to ALJ review of a determination of CMS or its contractor to deny reconsideration. Because Petitioner has no right to review, I have no authority to review whether or not there was good cause to extend the time to file a request for reconsideration. Furthermore, whether or not there was good cause to extend the time for requesting reconsideration is solely a matter within the discretion of CMS and its contractor under 42 C.F.R. § 498.22(d). Petitioner admits in his brief in opposition to the motion for summary judgment that he failed to make his arguments for an extension to CMS or its contractor.³ I conclude that dismissal is also appropriate under 42 C.F.R. § 498.70(b) because Petitioner has no right to a hearing.

³ If I concluded that I had authority to review whether there was good cause to extend the period for filing a request for reconsideration, I would conclude in this case that good cause has not been stated. Petitioner's affidavit and the brief of his counsel suggest some tactical decision not to file a timely request for reconsideration. Petitioner's explanation for not filing timely is nonsensical. Even though I fully credit Petitioner's assertion that he did not receive the June 14, 2011 initial determination until on or before December 31, 2014, Petitioner does not show good cause for not requesting reconsideration of that clearly adverse determination within 60 days of his admitted receipt of that document. Petitioner's concern about the allegation of fraud in the 2011 initial determination and delay in retaining counsel do not constitute good cause for failure to timely request reconsideration.

If Petitioner's arguments are viewed as requesting equitable relief, I have no authority to grant such relief. ALJs and the Departmental Appeals Board (Board) are bound by and may not ignore properly promulgated and applicable regulatory requirements. *US Ultrasound*, DAB No. 2302 at 8 (2010) (“[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.”). I am bound to follow the Act and regulations and have no authority to declare statutes or regulations invalid. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009) (“[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground.”).

IV. Conclusion

For the foregoing reasons, Petitioner's request for hearing is dismissed. I may vacate a dismissal if either party files such a request within 60 days of receipt of this dismissal and states good cause for such action. 42 C.F.R. § 498.72.

 /s/

Keith W. Sickendick
Administrative Law Judge