

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

Parvin Shafa MD Inc.
Docket No. A-17-114
Decision No. 2846
January 26, 2018

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

Parvin Shafa, M.D., Inc., (Petitioner) appeals an Administrative Law Judge's (ALJ's) dismissal of her request for hearing. *Parvin Shafa MD Inc., Dismissal, C-17-647* (Aug. 16, 2017). Petitioner had sought a hearing to challenge the effective date of her reactivated enrollment in Medicare as a supplier. After Petitioner failed to file a pre-hearing submission at the time set in the ALJ's prehearing order, the ALJ issued an order to show cause why the matter should not be dismissed. When Petitioner failed to respond to the show-cause order, the ALJ dismissed for abandonment.

Petitioner asks us to review the dismissal. We sustain the dismissal.

Background¹

Petitioner's enrollment as a supplier in the Medicare program was deactivated in 2015 for non-billing. Petitioner reapplied and was granted a new billing number with an effective date set for when the application was submitted. Petitioner sought reconsideration to obtain an earlier effective date and, when the reconsideration decision was unfavorable, timely requested a hearing before an ALJ. Petitioner uploaded her hearing request to the Board's electronic filing system (DAB E-File) on May 1, 2017.

On May 11, 2017, the ALJ issued an Acknowledgment and Prehearing Order (Prehearing Order) through DAB E-File. Among other detailed instructions, the Prehearing Order explained that the parties were required to use DAB E-File for all submissions unless the ALJ granted a waiver upon written request. Petitioner did not file (and the ALJ therefore did not grant) any such waiver in this case. Both parties were to notify the ALJ's office of who would represent them by May 22, 2017. CMS was told to file its prehearing

¹ The factual information in this section, unless otherwise indicated, is drawn from the Dismissal and the record and is presented to provide a context for the discussion of the issues raised on appeal. We make no new factual findings and omit record citations for undisputed events.

exchange no later than June 15, 2017; after receiving it, Petitioner had until no later than July 20, 2017 to file her prehearing exchange. Each prehearing exchange was to include a brief, proposed exhibits and witness list (with written direct testimony of each as a proposed exhibit). The ALJ warned the parties that he might impose sanctions if they failed to comply with his instructions and specifically stated that he would not ordinarily grant extensions because “[t]ime is of the essence in this case.” Prehearing Order at 6 (bold in original).

Counsel for CMS timely filed a notice of appearance and CMS’s prehearing exchange, including its Motion for Summary Judgment. Petitioner did not submit information about her representative and did not file a prehearing exchange.

On August 1, 2017, the ALJ issued an Order to Show Cause (OSC) why the case should not be dismissed for abandonment. He noted that Petitioner’s failure to comply with the Prehearing Order or to respond to CMS’s prehearing exchange suggested Petitioner had failed to appear for hearing within the meaning of 42 C.F.R. § 498.69(b)(1). OSC at 1, citing *Osceola Nursing & Rehab. Ctr.*, DAB No. 1708, at 7 (1999) (failure to appear at hearing in that regulation reasonably construed “to include failure to appear in written form by failing to file prehearing documents clearly ordered by an ALJ”). That regulation provides for dismissal for abandonment under the following conditions:

- (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.

Noting that section 498.69(b)(2) permitted dismissal for abandonment when a party fails to respond to an OSC within ten days, the ALJ ordered Petitioner to respond to the OSC within ten days by either submitting her prehearing exchange or a statement that she does not contest the facts set out in CMS’s Motion for Summary Judgment and seeks a decision on the written record. OSC at 1-2. He also required Petitioner to explain why she failed to file her exchange timely. *Id.* at 2. He concluded that “[s]hould Petitioner fail to comply with this Order or fail to show good cause, I will dismiss the case for abandonment.” *Id.*

Petitioner did not respond to the OSC. On August 16, 2017, the ALJ ordered the case dismissed (Dismissal). The ALJ stated that dismissal for abandonment was authorized under 42 C.F.R. § 498.69 because, in addition to her earlier noncompliance with the Prehearing Order, Petitioner had failed to respond within ten days to an OSC that notified Petitioner that dismissal would be the consequence. Dismissal at 1, citing *Consol. Cmty. Res., Inc.*, DAB No. 2676, at 5 (2016). The ALJ further explained that the parties could ask him to vacate the dismissal pursuant to 42 C.F.R. § 498.72 which 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. (Date of receipt is determined in accordance with § 498.22(b)(3).)²

The record does not show any request from Petitioner to the ALJ to vacate the dismissal. Instead, Petitioner filed a request for review (RR) with the Board on August 23, 2017.

CMS submitted a response to Petitioner’s RR on September 22, 2017; Petitioner submitted a reply to CMS’s response on October 30, 2017.³

Petitioner’s contentions

Below, we set out verbatim the core of Petitioner’s arguments in opposition to the dismissal of the hearing request:

Reason for appeal: I strongly object to the closing of my case Docket No. C-17-647 which has been rendered with insufficient notification that further action was required on the part of the petitioner.

My Response: I did NOT receive any letter or written notification that additional documentation was required with the Pre Hearing Order that was uploaded to the Dab E-file system on 5/11/2017.

The only notice I received was a nondescript email which stated that a document was uploaded which essentially stated that Gina Shin would be handling the case on 5/1/2017.

² Section 498.22(b)(3) provides 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.”

³ Also on October 30, 2017, Petitioner submitted a request for an extension of 60-90 days to submit her RR and “all other orders and directives by the ALJ” in this appeal, because she was in the process of seeking legal representation. The extension request was denied the next day on the grounds that all scheduled submissions in the case on appeal were already completed and, to the extent Petitioner intended to seek counsel for a presentation to the ALJ, she could do so if and when the matter was again before the ALJ. Therefore, an extension was unnecessary at this time.

Following this, the next notification I was are of was an email on 8/1/2017 saying that the case had been closed because a Pre Hearing Exchange has not been submitted.

After receiving the notification that my case had been closed due to the lack of these documents, I was prompted to search all inboxes for emails from the Dab e-filing system and only then was able to see that I had also received two email on 5/10/2017 and 5/11/2017. These emails did not appear in my standard inbox.

If you have any access to the notifications that the petitioner receives, you will be able to see that the request for prehearing exchange was only just opened for the first time on 8/23/2017.

As a physician, it is deeply troubling to me that such an email would be the only form of notification I would receive for a case that I have been working on for close to 2 years.

RR at 1. The remainder of the RR largely reproduces the original request for hearing addressing objections to the unfavorable reconsideration decision. RR at 1-3. Petitioner closes by stating that she might be forced to “fold” her practice if she is not paid for services rendered during the period when her billing number was deactivated, an outcome which she considers “an absolutely unjust and unconscionable price” for both herself and her “geriatric patients” to whom she has “been providing much needed medical services for decades.” RR at 3.

Analysis

The ALJ was within his authority to dismiss this case for abandonment.

A. Petitioner received the Order to Show Cause timely and failed to act on it.

Not only does Petitioner fail to offer a persuasive explanation for her failure to respond to the ALJ’s Prehearing Order, but a close reading of Petitioner’s own account of events establishes that she received the OSC timely and still failed to comply with the ALJ’s instructions. Petitioner recounts that she received the notice of appearance by CMS’s representative through DAB E-File on May 1, 2017. She asserts that she did not open or read the emails sent to her by DAB E-File on May 10 and 11, 2017, until August 1, 2017 when she received a further notification from DAB E-File.⁴

⁴ Petitioner is not entirely clear about which notifications she means by the May 10 and 11, 2017, emails, but the DAB E-File system shows that an additional paper copy of Petitioner’s request for hearing was uploaded by CRD staff on May 10, 2017, and the Prehearing Order and accompanying documents were uploaded on May 11, 2017.

In other words, she acknowledges that on August 1, 2017, she received and opened the notification from DAB E-File and, at that point, looked for and located earlier notifications. But the August 1, 2017, notification did not, as Petitioner claims, inform her that the case had been closed. Instead, Petitioner received notice on August 1, 2017, that the case **would** be closed unless she took the required actions to demonstrate that she had not abandoned it. At that point, she thus admits she had accessed the Prehearing Order and the OSC. She had sufficient information to know what was required of her (even if we accept her unsupported claim that she had not received earlier notice of the Prehearing Order, which we find dubious for reasons discussed in the next section). Yet she does not claim to have taken any action to comply with the OSC or even to contact the ALJ's office to notify the ALJ of her belated awareness of the Prehearing Order.

Therefore, even Petitioner's own description of her actions leaves no doubt that the ALJ did not abuse his discretion in concluding that she chose not to pursue her appeal within the meaning of subsections 498.69(b)(1) and (2) given that she failed to appear by not submitting the required prehearing exchange and that she failed to respond to the OSC within ten days.

- B. Petitioner had ample notice of her responsibilities using DAB E-File and failed to act on them.

Petitioner's claim that her objection to the ALJ dismissal is based on insufficient notification flies in the face of the ample information she was provided about how to use and what to expect from DAB E-File. It also ignores the fact that the entire docket was at all times available for her review as a registered user.

The public instructions for users who register for DAB E-File provide detailed information on how the system works, how users will be informed of filings in their cases, and what responsibilities users undertake. Relevant excerpts from those instructions are as follows:

E-Filing Registration

To register as a user of DAB E-File, click "Register" on the DAB E-File home page, enter the information requested on the "Register New Account" form, then click "Register Account" at the bottom of the form.

As part of the registration process, the party or party's representative will be asked to provide an e-mail address and choose a password. Confirmation of the registration will be sent to the e-mail address that the registrant provided. *DAB E-File will send notice to the registrant's e-mail address of electronic filing (by all parties, including the registrant) or*

posting (by CRD [Civil Remedies Division of DAB]) of appeal-related documents.

* * *

A Registered User must promptly update its DAB E-File account to reflect changes in the user's telephone number, e-mail address, or postal mailing address. To update this information, log in to DAB E-File from the system's home page, then click the "Manage Account" button on the left side of the screen.

* * *

How CRD Will Use the E-Filing System

When a party has filed its request for hearing via DAB E-File, CRD will use that system to issue and serve upon the parties any notice, order, ruling, or decision. CRD will not mail paper copies to the parties in that circumstance.

When CRD issues a document via DAB E-File, the document is posted to the relevant appeal's docket sheet. Simultaneously, an e-mail is sent to all parties, or parties' representatives, notifying them of the document's issuance.

Date of Receipt of CRD Documents

Absent notice to CRD of circumstances that precluded or delayed e-mail delivery, the parties are deemed to have received a notice, order, or other document that CRD served on the parties using DAB E-File *on the date the document is posted to DAB E-File.*

Electronic Docket Sheet: Viewing and Downloading Appeal Documents

For each docketed appeal, DAB E-File generates a "docket sheet" that lists, by filing date and time, all documents submitted by the parties and all documents that CRD issued for that appeal. *A party may view or download any appeal-related document by clicking on the docket sheet's link to that document.*

Problems with E-mail Delivery

Registered Users are responsible for ensuring that e-mail from DAB E-File (notifications@dab.efile.hhs.gov) is not blocked by spam or other filters.

Using the Departmental Appeals Board Electronic Filing System (“DAB E-File”) For Cases Before the Civil Remedies Division, https://dab.efile.hhs.gov/appeals/to_crd_instructions?locale=en (Bold in original; italics added).

Several things are clear from these instructions that undermine Petitioner’s arguments before us. First, Petitioner was clearly informed that notice of all developments in the case – either party filings or posting of issuances by the ALJ – would be provided in the form of e-mails to the e-mail address provided by Petitioner upon registration. Hence, Petitioner should have known not to ignore “nondescript email” from the DAB E-File system.

Second, Petitioner was responsible for promptly updating her e-mail address in the DAB E-File system if she wished to change where the notices would be delivered and for ensuring that the address she used would not block receipt of such notices. We find Petitioner’s allegations that DAB E-File notices from May 2017 somehow appeared only in a non-standard inbox which Petitioner only thought to search in August 2017 both vague and implausible. Even if we accepted these allegations, however, we would not find them sufficient to discharge Petitioner’s responsible to ensure that she was able to receive e-mail notifications from the system reliably at the e-mail address with which she registered.

Finally, Petitioner had independent access at all times to the docket for her case, including every document filed by a party or posted by the ALJ’s office. She offers no explanation for allowing months of inaction to pass without checking that docket to determine the status of her case and without contacting the ALJ’s office if she encountered any difficulty, even after admitted receiving the notice that her case was subject to dismissal due to her failures.

Petitioner cites no authority for us to reverse the ALJ’s dismissal on grounds of equity.

As mentioned above, Petitioner expresses distress at the potential impact on her practice of losing income during the deactivation period and asserts that the dismissal imposes an unjust price on her and her patients. RR at 3. We construe these assertions as a request for equitable relief from the ALJ dismissal.

The Board has consistently held that neither it nor an ALJ is authorized to take action based on equitable arguments contrary to binding regulations or laws. *Sunview Care & Rehab Ctr. LLC*, DAB No. 2713, at 12 (2016). Petitioner does not cite any authority that would enable us to overturn the ALJ's dismissal for such reasons here.

In any case, we find no unfairness in the ALJ dismissal in this case. To the extent the consequences are indeed serious, Petitioner had it in her power to avoid them. The ALJ provided her with multiple opportunities to cure her inaction and explain her omissions. She chose not to submit anything to the ALJ and instead waited until her appeal to us to proffer explanations. As we explained already, those explanations are unpersuasive.

The ALJ acted reasonably in ultimately enforcing his orders and dismissing the request for hearing. We will not disturb that action.

Conclusion

The ALJ Dismissal is sustained and is 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.”).

/s/

Christopher S. Randolph

/s/

Constance B. Tobias

/s/

Leslie A. Sussan
Presiding Board Member