**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Vanguard Vascular & Vein, PLLC (NPI 1538452180),
Trent E. Proffitt, M.D. (NPI 1578513396), and
Franklin S. Yau, M.D. (NPI 1295764033),

Petitioners,

- v. -

Centers for Medicare and Medicaid Services.

Docket No. C-12-1263

ALJ Ruling No. 2013-3

Date: February 14, 2013

## ORDER OF DISMISSAL

This case is before me on the Centers for Medicare and Medicaid Services' (CMS) motion to dismiss Petitioners' request for hearing dated September 11, 2012. For the reasons set forth below, I grant the motion to dismiss Petitioners' request for hearing.

### I. Background and Procedural History

On December 7, 2011, Trailblazer Health Enterprises, LLC (Trailblazer), a contractor acting on behalf of CMS, received the applications of Drs. Proffitt and Yau to enroll in the Medicare program as part of a newly-established multi-specialty group practice, Vanguard Vascular & Vein. Trailblazer received a separate enrollment application for the group practice the same day. On March 1, 2012, Trailblazer approved all three of Petitioners' applications for enrollment in the Medicare program effective November 9, 2011.

On May 2, 2012, Trailblazer received Petitioners' request for reconsideration of their effective date for enrollment in the Medicare program. On May 16, 2012, Trailblazer issued an unfavorable decision that upheld the November 9, 2011 effective date.

Petitioners filed a request for hearing dated September 11, 2012, which the Civil Remedies Division (CRD) of the Departmental Appeals Board (Board) received on September 14, 2012. Petitioners requested an administrative law judge (ALJ) hearing to challenge the effective date of their enrollment in the Medicare program. Petitioners argued that Drs. Proffitt and Yau were never "disenrolled" from the Medicare program, and should be able to bill for services rendered to Medicare beneficiaries retroactive to June 1, 2011. Petitioners explained that, after successful licensure and credentialing, the group practice "has been treating patients, including Medicare beneficiaries, since June 1, 2011." Hearing Request at 2. This case was assigned to me for a hearing and decision.

Following my Acknowledgment and Prehearing Order, issued October 2, 2012, CMS filed a Motion to Dismiss Petitioners' hearing request (CMS Mot.) as well as a separate Motion for Summary Judgment with supporting Prehearing Brief. CMS also submitted 16 proposed exhibits (CMS Exs. 1-16). CMS argued that Petitioners' hearing request should be dismissed because Petitioners filed their hearing request 53 days beyond the regulatory deadline for doing so. CMS Mot. at 2. Petitioners, through counsel, filed a Response to CMS's Motion to Dismiss and Request for Extension of Deadline (P. Resp. Br.), a Prehearing Brief, and two proposed exhibits. P. Exs. 1-2. Petitioners acknowledged the delay in filing their hearing request, claimed that the delay was the result of misinformation from a Trailblazer representative and a CMS brochure, and argued that "good cause" existed for extending the deadline for filing under 42 C.F.R. § 498.40(c)(2). P. Resp. Br. at 3. After I granted CMS leave to do so, CMS filed a Reply to Petitioners' Response (CMS Reply Br.) and a supplemental proposed exhibit (CMS Ex. 17), arguing that Petitioners had not shown good cause to extend the deadline for filing. Upon my granting Petitioners leave to respond, Petitioners filed a Surreply to CMS's Reply (P. Surreply Br.) with a supplemental proposed exhibit (P. Ex. 3). After I granted CMS leave to amend its reply brief, CMS filed an Amended Reply to Petitioners' Response (CMS Amend. Reply Br.).

I have considered all of the parties' submissions in reaching my conclusion. While the regulations do not permit an aggrieved provider or supplier to file new documentary evidence at this level of review, a provider or supplier may do so upon a showing of good cause. 42 C.F.R. § 498.56(e)(1). The new documents Petitioners submitted here directly relate to their argument about whether good cause exists to extend the deadline for filing their hearing request. That issue was not and could not have been before the hearing officer at the reconsideration level of review. Therefore, I will consider the documents Petitioners submitted for the first time at this level of review for the limited purpose of whether good cause exists to extend the deadline for filing their hearing request.

## II. Analysis

### A. Applicable Law

A provider or supplier dissatisfied with an initial determination may request reconsideration within 60 days of receiving the initial determination.[1] 42 C.F.R. §§ 498.5(l)(1), 498.22(b)(3). Receipt of the notice of an initial determination is presumed to be five days after the date on the notice unless evidence shows that it was, in fact, received earlier or later. *Id.* § 498.22(b)(3). A provider or supplier dissatisfied with a reconsidered determination "is entitled to a hearing before an ALJ." *Id.* § 498.5(l)(2). To request a hearing, the affected party "must file the request in writing within 60 days from receipt of the notice of initial, reconsidered, or revised determination unless that period is extended in accordance with paragraph (c) of this section." *Id.* § 498.40(a)(2). Like the notice of an initial determination, receipt of the notice of a reconsidered determination is presumed to be five days after the date of notice unless shown otherwise. *Id.* If the request for a hearing before an ALJ is not received within 60 days of the receipt of the reconsidered determination:

> (1) The affected party or its legal representative or other authorized official may file with the ALJ a written request for extension of time stating the reasons why the request was not filed timely.
>
> (2) For good cause shown, the ALJ may extend the time for filing the request for hearing.

*Id.* § 498.40(c). The regulations do not define what constitutes "good cause" to extend the filing deadline for a hearing request, and the Board "has never attempted to provide an authoritative or complete definition of the term 'good cause' in section 498.40(c)(2)." *Brookside Rehab. & Care Ctr.*, DAB No. 2094, at 7, n.7 (2007) (*citing Glen Rose Med. Ctr. Nursing Home*, DAB No. 1852, at 7, n.5 (2002)). Rather, a review of the relevant circumstances of each case is critical to determine whether there is "good cause" to extend the filing deadline. *See NBM Healthcare, Inc.*, DAB No. 2477, at 3 ("[T]he facts of this case do not show good cause under any reasonable definition of that term."); *see also Quality Total Care, LLC d/b/a The Crossings*, DAB No. 2242, at 4-5, n.4 (2009) (same).

### B. Issue

Petitioners filed their request for an ALJ hearing on September 11, 2012, which was 113 days after Petitioners were presumed to have received Trailblazer's reconsidered

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[1] An "initial determination" includes, among other things, the "effective date of a Medicare provider agreement or supplier approval." 42 C.F.R. § 498.3(b)(15).

determination issued May 16, 2012. *See* 42 C.F.R. §§ 498.22(b)(3), 498.40(a)(2). Petitioners do not dispute that they filed their hearing request beyond the 60-day deadline for doing so. *See id.* § 498.40(a)(2). There is no dispute that Petitioners filed a written request to extend the deadline for filing their hearing request. *See id.* § 498.40(c)(1). Therefore, the only issue currently before me is whether Petitioners have shown "good cause" to extend the deadline for filing their hearing request. *Id.* § 498.40(c)(2).

**C. Discussion**

Petitioners argue that they have shown "good cause" to extend the time to file their hearing request because they reasonably relied on misinformation about the filing deadline that a Trailblazer representative provided. Petitioners claim that they contacted Trailblazer's "Provider Enrollment hotline" after the initial determination, and an unidentified Trailblazer representative referred Petitioners to a CMS brochure that explained the appeals process. P. Ex. 1, at 1-2, ¶ 3. According to Petitioners, that brochure, "The Medicare Appeals Process: Five Levels to Protect Providers, Physicians, and Other Suppliers," provided a 120-day deadline to request reconsideration and a 180-day deadline to file a hearing request. P. Resp. Br. at 2-3; *see* P. Exs. 2, 3.

Even if true, Petitioners' arguments do not show "good cause" to extend the deadline for filing their hearing request for two reasons: (1) Petitioners unreasonably relied on the statements of a Trailblazer representative rather than the conspicuous and unambiguous language in the reconsidered determination; and (2) Petitioners' arguments amount to equitable estoppel, for which they have shown no affirmative misconduct, and for which I am unable to grant relief.

The content of the CMS brochure that Petitioners allegedly relied upon should have made Petitioners aware that the brochure was inapplicable to this appeal. The brochure repeatedly uses terms such as "Medicare claims" and "claim determinations," and references entities that Petitioners had no contact with such as "Qualified Independent Contractors (QICs)." *See* P. Ex. 3, at 2. The CMS brochure also references an entirely separate level of appeal, a "redetermination," which Petitioners never requested or received. P. Ex. 3, at 2. The CMS brochure never refers to provider or supplier enrollment or appeals of enrollment decisions such as the effective date of Medicare enrollment. Moreover, the brochure directs appellants to include information such as the "[b]eneficiary name, Medicare Health Insurance Claim (HIC) number, [s]pecific service and/or item(s) for which a redetermination is being requested, [and] [s]pecific date(s) of service" in the appeal requests. P. Ex. 3, at 2. The enrollment process for providers and suppliers does not require submission of a beneficiary name or HIC number. Indeed, Petitioners did not submit a beneficiary name or HIC number. Petitioners should have reasonably known that, based on its content, the brochure referred to an entirely separate appeals process than one for provider and supplier enrollment.

Even if Petitioners overlooked or were confused by the substance of the CMS brochure, the unambiguous and conspicuous language in the reconsidered determination made it clear that Petitioners had 60 days from receipt of the reconsidered determination to request a hearing. *See* CMS Ex. 1, at 3. The Trailblazer hearing officer stated:

> FURTHER APPEAL RIGHTS: ADMINISTRATIVE LAW JUDGE (ALJ) If you are satisfied with this decision, you do not need to take further action. If you believe that this determination is not correct, you may request a final ALJ review. You must act quickly and must meet the requirements for requesting a final ALJ review. *The appeal must be filed within 60 calendar days after the date of receipt of this decision* . . . .

CMS Ex. 1, at 3 (emphasis added).

Petitioners do not explain why they disregarded this clear notice of further appeal rights in the reconsidered determination, but instead relied on a CMS brochure that was clearly inapplicable to enrollment appeals. At a minimum, any discrepancy between the brochure and the language of the reconsidered determination should have made Petitioners aware that one of the documents was incorrect. It was unreasonable for Petitioners to rely on a brochure that cited different regulations than those in the reconsidered determination and used different terms than those the commonly used in the Medicare enrollment process. It was equally unreasonable for Petitioners not to follow the clear instructions included in the determination they sought to appeal.

Ultimately, it is unlikely that Petitioners actually relied on the CMS brochure. In their hearing request, Petitioners stated that they "respectfully request a hearing under 42 [C.F.R.] §§ 498 and 424 for the purpose of reconsideration for the effective enrollment date of the three PTAN's listed below." Hearing Request at 1. Petitioners did not include any of the items stated in the CMS brochure that are necessary for a request for review. *See* P. Ex. 3, at 2 (requiring items such as the beneficiary's name and HIC number). In addition, Petitioners requested a "hearing," which is only referenced in the "third level of appeal" in the brochure. P. Ex. 3, at 2. The "third level of appeal" in the CMS brochure has the *same filing deadline*, 60 days from receipt, as a request for a hearing under 42 C.F.R. Part 498. P. Ex. 3, at 2; 42 C.F.R. § 498.40(a)(2). Perhaps most notable, 42 C.F.R. Parts 424 and 498, which Petitioners refer to in their hearing request, are not referenced anywhere in the CMS brochure, but are referenced in Trailblazer's reconsidered determination. *Compare* P. Ex 3, at 2 *with* CMS Ex. 1, at 4. Therefore, it is more reasonable, based on the content of Petitioners' hearing request, that Petitioners knew which regulations apply in enrollment appeals as well as the appropriate filing deadline.

In addition, Petitioner has not submitted any written statements from CMS or Trailblazer that permit a provider or supplier to file a request for a hearing, as Petitioners did here,

more than 60 days after receipt of the reconsidered determination. As noted above, the CMS brochure that Petitioners reference actually provides the same timeframe (60 days) for filing a request for a hearing. The brochure states that if "at least $130 remains in controversy following the QIC's decision, a party to the reconsideration may request an ALJ hearing *within 60 days of receipt of the reconsideration*." P. Exs. 2, at 2; 3, at 2 (emphasis added). Thus, even if Petitioners actually relied on the CMS brochure, they should have filed their hearing request within 60 days of receiving Trailblazer's reconsidered determination.[2]

I find that Petitioners did not show "good cause" to extend the deadline for filing their hearing request based on the alleged misstatements of the Trailblazer employee and their mistaken reliance on the CMS brochure. It is unlikely that Petitioners actually relied on the CMS brochure based on the substance of their hearing request, but even if they did rely on the CMS brochure, such reliance was unreasonable in light of the plain directive in the reconsidered determination. It is untenable under any circumstances to disregard the plain language of the determination the Petitioners sought to appeal and replace it with the statements of an unknown Trailblazer employee and unrelated CMS brochure. Moreover, the plain language in the CMS brochure, which provided the same deadline for filing a hearing request, increases the unreasonableness of Petitioners' arguments. *See Hillsborough County Nursing Home*, DAB CR2386, at 4 (2011) (finding that the petitioner's unreasonable interpretation of a CMS letter was not "good cause" to extend the filing deadline); *see also Elinor Schottstaedt, M.D.*, DAB CR2131, at 4 (2010) ("Petitioner only needed to read the decision to be aware of her rights. Petitioner offers no argument . . . that she was unable to read and understand the reconsideration decision. Thus, I am left to infer that Petitioner's failure to timely request review was the result of carelessness, which is never good cause to extend the time for filing a request for hearing.").

Moreover, because Petitioners did not allege any affirmative misconduct by Trailblazer personnel, Petitioners' arguments amount to a claim of equitable estoppel for which I am unable to grant any relief. It is well-established that: (1) estoppel cannot be the basis to require payment of funds from the federal fisc; (2) estoppel cannot lie against the government, if at all, absent a showing of affirmative misconduct, such as fraud; and (3) I am not authorized to order payment contrary to law based on equitable grounds. It is

[2] Any inference Petitioners followed the procedures listed in the "second level of appeal" in the CMS brochure when filing their request for hearing with the CRD is unsupported. When Petitioners filed their hearing request, Petitioners must have known they were not requesting "reconsideration" under the "second level of appeal" in the CMS brochure because they expressly requested a "hearing," which is not used in that section of the CMS brochure. In addition, Petitioners did not submit a Medicare Redetermination Notice (MRN), which is required with all requests for "reconsideration" referenced the CMS brochure. P. Ex. 3, at 2.

well settled that those who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to law. *See, e.g., Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51 (1984); *Oklahoma Heart Hosp.*, DAB No. 2183, at 16 (2008); *Wade Pediatrics*, DAB No. 2153, at 22 n.9 (2008), *aff'd*, 567 F.3d 1202 (10th Cir. 2009); *US Ultrasound*, DAB No. 2303, at 8 (2010). Therefore, even if I accepted that Petitioners reasonably relied upon the Trailblazer representative's statements, which I do not, Petitioners' equitable estoppel argument is not "good cause" to extend the filing deadline. Petitioners' request to extend the deadline for filing their hearing request based on the alleged misstatements of the Trailblazer representative is denied and Petitioners' hearing request is dismissed.

/s/
Scott Anderson
Administrative Law Judge