

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Capital District Behavioral Health Psychologists, PLLC
(NPI: 1215152962),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-744

ALJ Ruling No. 2017-24

Date: September 1, 2017

RULING DISMISSING REQUEST FOR HEARING

Pursuant to 42 C.F.R. § 498.70(b) I dismiss the hearing request of Petitioner, Capital District Behavioral Health Psychologists, PLLC. Petitioner has no right to a hearing because there is no reconsideration determination in this case.

I. Background

Petitioner filed a hearing request in which it sought to challenge the effective date of its participation in Medicare. On my initial review of the case record I noticed that there was no reconsideration determination. I ordered the parties to brief the issue of whether Petitioner was entitled to a hearing. Order Directing the Parties to Brief the Issue of Jurisdiction, June 9, 2017. The Centers for Medicare & Medicaid Services (CMS) then filed a motion to dismiss the hearing request on the ground that I lacked jurisdiction to hear and decide the case. Petitioner opposed the motion. With its motion CMS filed five proposed exhibits, identified as CMS Ex. 1-CMS Ex. 5. In opposition, Petitioner filed an affidavit and three proposed exhibits, identified as Exhibits "A" through "C." I receive these exhibits into the record for purposes of deciding the issue of jurisdiction.

II. Ruling

Petitioner has no right to a hearing. Under regulations governing hearings in cases involving CMS, a supplier that is dissatisfied with a determination of its effective date of participation may file a request for reconsideration of that determination. Hearing rights emanate from an adverse reconsideration determination. There *must* be a reconsideration determination that is adverse to the supplier in order for the supplier to have hearing rights. Absent such a determination, the supplier has no right to an administrative hearing. 42 C.F.R. § 498.5(1)(2); *Denise A. Hardy, D.P.M.*, DAB No. 2464 at 4-5 (2012); *Hiva Vakil, M.D.*, DAB No. 2460 at 4-5 (2012).

It is undisputed that the contractor with which Petitioner filed its reconsideration request dismissed that request without addressing the merits of it. CMS Ex. 5. It issued no reconsideration determination. Consequently, and as a matter of law, Petitioner has no right to a hearing and I am without authority to hear and decide this case.

The contractor's reason for dismissing the hearing request was that Petitioner did not file a timely request for reconsideration. The contractor concluded that Petitioner filed its request contrary to regulatory requirements that it must file a request for reconsideration within 60 days of the date that it received the initial determination notice.

Under governing regulations, a supplier wishing to challenge an initial determination must do so within 60 days of its receipt of the determination. 42 C.F.R. § 498.22(b). Receipt of the notice is presumed to be five days from the date of the notice unless there is a showing that the affected party actually received it at an earlier or later date. 42 C.F.R. § 498.22(b)(3). If a party fails to file a reconsideration request by the deadline, it loses its right to reconsideration and the contractor or CMS may dismiss the request. 42 C.F.R. § 498.22(d). The contractor or CMS may grant a provider an extension of time within which to challenge an initial determination. The authority to do so is discretionary and not reviewable.

As I have stated, there is no reconsideration determination in this case and Petitioner is not entitled to a hearing as a matter of law. There is nothing in the regulations governing hearings that authorizes me to review and reverse a contractor's or CMS's determination to dismiss a request for reconsideration. That determination is non-reviewable. Thus, I lack jurisdiction to hear and decide this case without regard to whether Petitioner timely filed its request for reconsideration.

That said, the facts offered by the parties plainly establish that Petitioner filed its request for reconsideration untimely. It had no right to reconsideration and the contractor acted pursuant to regulatory requirements when it dismissed Petitioner's reconsideration request.

On October 6, 2016, the contractor sent a letter to Petitioner containing the contractor's effective date determination. CMS Ex. 3. The contractor followed up the written notice by sending an e-mail to Petitioner on October 11, 2016. *Id.* at 4. Thus, the presumed and actual receipt dates of the contractor's notice are the same: October 11, 2016. Petitioner had 60 days from October 11 within which to request a hearing. Its deadline to do so was December 10, 2016.

The contractor did not receive a reconsideration request from Petitioner until December 15, 2016. CMS Ex. 4. The receipt date was beyond the 60-day limit and, on that basis, the contractor dismissed Petitioner's reconsideration request. The contractor's decision to do so is entirely consistent with regulatory criteria.

Petitioner now argues that it did not receive the contractor's notice until October 14, 2016. It asserts that it filed its reconsideration request within 60 days of October 14 because its request was mailed December 13, 2016.

I stress again that the contractor's decision to dismiss in this case is non-reviewable. However, I find also that Petitioner's argument finds no basis in fact. Petitioner's assertion that it did not receive the contractor's notice until October 14 is belied, both by the fact that the contractor sent an e-mail to Petitioner on October 11, 2016, containing the initial determination and by the fact that Petitioner conceded in its request for reconsideration that it was filing the request untimely. CMS Ex. 4 at 6; P. Ex. C at 3. I find that Petitioner received the contractor's notice by no later than October 11, notwithstanding its present claim that it didn't receive it until October 14, 2016. Petitioner did not satisfy its December 10, 2016 deadline for filing a reconsideration request.¹

_____/s/_____
Steven T. Kessel
Administrative Law Judge

¹ I find irrelevant Petitioner's argument that the date that it *mailed* its reconsideration request to the contractor is controlling as to whether it met its filing deadline. Accepting as correct Petitioner's assertion that it mailed its request on December 13, that is nevertheless after the deadline for filing the request.