

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Robert E. Darnaby, M.D.  
(PTANs: 390700, M400055587, 94093),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-18-205

ALJ Ruling No. 2018-6

Date: February 15, 2018

**DISMISSAL**

On November 22, 2017, I issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order) in which I observed that Petitioner's hearing request may have been untimely filed. Pre-Hearing Order ¶ 1. My Pre-Hearing Order permitted, but did not require, the Centers for Medicare & Medicaid Services (CMS) to file a motion to dismiss if it believed Petitioner had not shown good cause for the untimely filing. *Id.* On December 21, 2017, CMS filed a Motion to Dismiss (CMS Motion), along with twelve proposed exhibits (CMS Exs. 1-12). Also on December 21, 2017, I issued an Order Extending Pre-Hearing Deadlines and Compelling Petitioner to Enroll in the Electronic Filing System or to Request a Waiver (Ext. Order). In that order, I directed Petitioner to respond to the CMS Motion on or before January 16, 2018. Ext. Order ¶ 1. Petitioner timely filed his response (P. Resp.) along with three exhibits.<sup>1</sup> As explained more fully below, I do not find that

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<sup>1</sup> Petitioner designated two exhibits as "Exhibit A" and "Exhibit B." Exhibit A is a copy of a letter to Petitioner dated August 8, 2016; Exhibit B is an affidavit signed by an individual identified as the custodian of records for Franciscan Health. Petitioner also submitted his own affidavit, which he did not mark as an exhibit. For consistency, I will refer to Petitioner's affidavit as Petitioner's Exhibit C. Petitioner's affidavit cross-references another "Exhibit B," described as a letter from Unity Health Services.

Petitioner's response demonstrates that he had good cause for filing his hearing request out of time. I therefore dismiss the hearing request.

***1. Petitioner's hearing request was filed untimely.***

Wisconsin Physicians Services (WPS), a CMS Medicare administrative contractor, issued an unfavorable reconsidered determination dated March 14, 2017. CMS Ex. 11. The reconsidered determination denied Petitioner's request to establish an earlier effective date for his Medicare enrollment and billing privileges. *Id.* at 2. By letter postmarked November 9, 2017, Petitioner requested a hearing to contest the reconsidered determination. Request for Hearing (RFH). I take administrative notice that November 9, 2017, is 240 days after March 14, 2017.

Pursuant to 42 C.F.R. § 498.40(a)(2), a hearing request must be filed within 60 days from receipt of the reconsidered determination. I will presume that a party received the reconsidered determination five days after the date of the notice unless the party shows that it was, in fact, received earlier or later. 42 C.F.R. § 498.22(b)(3), *incorporated by reference in* 42 C.F.R. § 498.40(a)(2). Petitioner asserts that he did not receive a copy of the reconsidered determination within five days after March 14, 2017. RFH. However, Petitioner does acknowledge that, on April 10, 2017, staff of Unity Healthcare LLC (Unity) informed him of WPS's unfavorable reconsidered determination. *Id.* He objects that neither WPS nor Unity sent a copy of the determination to him. *Id.* Petitioner also represents that Unity did not inform him of the opportunity to request a hearing before an administrative law judge. RFH; *see also* P. Ex. C ¶ 8.

I conclude that Petitioner's representations do not rebut the presumption that he (or his authorized representative) received a copy of the reconsidered determination on or before March 19, 2017. Accordingly, Petitioner's hearing request was filed untimely. Petitioner's hearing request explains that he was "partnered with" Unity at the time WPS requested revalidation. RFH. Petitioner further acknowledges that he delegated to Unity's credentialing staff the task of straightening out the problem with his Medicare revalidation. *Id.* Because Petitioner delegated to Unity staff the responsibility for dealing with WPS regarding his Medicare revalidation, it was proper for WPS to send notice of its reconsidered determination to Unity, as Petitioner's agent. Consistent with this authority, WPS addressed the reconsidered determination to Unity. CMS Ex. 11.

I accept that Petitioner himself may not have received a copy of the notice from WPS on or before March 19, 2017. However, that Petitioner may not personally have received the notice does not rebut the presumption that Unity, which he authorized to correspond with

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However, that letter was not a part of the electronic submission Petitioner filed. Because neither party objected to any of the exhibits proposed by the opposing party, I admit CMS Exs. 1-12 and Petitioner's Exhibits (P. Exs.) A-C into the record.

WPS for this purpose, did receive the notice on or before March 19, 2017. Moreover, Petitioner acknowledges that, at least as of April 10, 2017, Unity had informed him that WPS had issued an unfavorable reconsideration. RFH. This is consistent with Unity having received the notice sometime in March 2017. I therefore conclude that Petitioner failed to rebut the presumption that Unity (acting on his behalf) received the reconsidered determination on or before March 19, 2017.

***2. Petitioner has not demonstrated good cause for the untimely filing.***

Because Petitioner did not file his hearing request within 60 days after March 19, 2017 (the presumed date of receipt), I must dismiss the hearing request unless I find there was good cause for the untimely filing. 42 C.F.R. § 498.40(c)(2). Under the circumstances presented here, I do not find good cause for Petitioner's untimely filing.

Appellate panels of the Departmental Appeals Board (DAB) have not attempted to provide a complete or authoritative definition of good cause, but have generally supported administrative law judges' views that circumstances within a party's ability to control do not establish good cause. *See, e.g., MedStar Health, Inc.*, DAB No. 2684 at 8 (2016) (circumstances within a party's control do not establish good cause under any reasonable definition of the term). Here, it was within Petitioner's power to direct Unity's actions, which Unity took based on Petitioner's delegation of authority to Unity. Further, having delegated to Unity staff the responsibility to handle his revalidation, Petitioner cannot be heard to complain that Unity did not properly exercise those responsibilities. Petitioner himself, and not an agent or employee, is ultimately responsible for maintaining compliance with Medicare requirements. *See, e.g., Dr. Elinor Schottstaedt, M.D.*, DAB No. 2337 at 5 (2010) (supplier herself, and not her office manager, "was responsible for assuring compliance with participation standards, including those of part 498").

Significantly, Petitioner acknowledges that, at least by April 10, 2017, Unity informed him that WPS had denied his request for an earlier effective date of revalidation. This information should have led him to inquire further. If, on April 10, 2017, Petitioner had asked for a copy of the WPS reconsidered determination, Unity presumably would have provided it.<sup>2</sup> Had he requested and received a copy of the reconsidered determination, Petitioner would have been aware of WPS's instructions regarding the methods and timeframes for filing an appeal to an administrative law judge. *See CMS Ex. 11 at 2-4.* Moreover, as of April 10, 2017, there still remained more than a month before the

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<sup>2</sup> While Petitioner's affidavit states that Unity did not inform him of his right to request a hearing, the affidavit does not assert that Petitioner requested, and Unity refused to provide, a copy of the reconsidered determination. P. Ex. C.

deadline to file a hearing request would expire.<sup>3</sup> Yet, Petitioner did not file his hearing request until November 9, 2017, that is, more than six months after learning of the unfavorable decision. For these reasons, Petitioner has not shown good cause for filing his hearing request out of time.

***3. Petitioner’s argument that WPS misdirected the request for revalidation does not require a different result.***

Petitioner devotes his response to explaining that he did not receive the WPS request to revalidate his Medicare enrollment information because the revalidation request was sent to an incorrect address. P. Resp. On this basis, Petitioner argues that WPS should not have deactivated his Medicare enrollment and that he should not be subject to a gap in his billing privileges. *Id.* The response provides little, if any, evidence or argument justifying the untimely filing beyond what was stated in his hearing request.

As I have concluded above, the hearing request was filed untimely and there is no good cause for the untimely filing. For those reasons, the hearing request must be dismissed. I add this brief discussion to explain why, even if I found Petitioner’s hearing request to be timely, I would nevertheless sustain the effective date of reactivation (and resulting gap in billing privileges) assigned by WPS.

If Petitioner had filed a timely hearing request, my jurisdiction in this case would be limited to reviewing the effective date of the approval of Petitioner’s reactivation enrollment application. 42 C.F.R. § 498.3(b)(15). I do not have jurisdiction to review WPS’s deactivation of Petitioner’s Medicare billing privileges because deactivation is not an “initial determination” and deactivation decisions have a separate review process. *See* 42 C.F.R. §§ 424.545(b), 498.3(b); *see also Willie Goffney, Jr., M.D.*, DAB No. 2763 at 4-5 (2017).

Thus, even if Petitioner were correct in asserting that WPS mishandled the request to revalidate his Medicare enrollment information by sending it to an incorrect address, this would not be a basis to grant Petitioner an earlier effective date. As an appellate panel of the Departmental Appeals Board observed in *James Shepard, M.D.*, providers and suppliers may not challenge indirectly an action for which the regulations prohibit direct administrative review. DAB No. 2793 at 8 (2017). In *Shepard*, the panel held that the supplier could not obtain review of a CMS contractor’s rejection of a previous enrollment application by challenging the effective date of enrollment based on a later approved application. For the same reasons articulated by the panel in *Shepard*, Petitioner’s arguments in the present case amount to a backdoor challenge to a contractor determination—here, deactivation—for which there are no administrative appeal rights. *See id.*

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<sup>3</sup> I take administrative notice that the 65<sup>th</sup> day after March 14, 2017 was May 18, 2017.

## ORDER

Petitioner's hearing request was not filed within 60 days after his agent received the March 14, 2017 reconsidered determination, as required by 42 C.F.R. § 498.40(a)(2). For the reasons explained above, Petitioner failed to demonstrate that he had good cause for filing the hearing request out of time as provided in 42 C.F.R. § 498.40(c). For the same reasons, I grant the CMS Motion to Dismiss. I order that Petitioner's hearing request be dismissed. The parties may request that an order dismissing a case be vacated pursuant to 42 C.F.R. § 498.72.

\_\_\_\_\_/s/\_\_\_\_\_  
Leslie A. Weyn  
Administrative Law Judge