

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

ORDER OF MEDICARE APPEALS COUNCIL
REMANDING CASE TO ADMINISTRATIVE LAW JUDGE

In the case of

Claim for

Philip B. Khoury, M.D.
(Appellant)

Supplementary Medical
Insurance Benefits (Part B)

(Beneficiary)

(HIC Number)

Highmark Medicare Services
(Contractor)

(ALJ Appeal Number)

The Administrative Law Judge (ALJ) issued a dismissal dated September 1, 2009, which concerned the appellant's request for an ALJ hearing following an overpayment determination issued by SafeGuard Services - Pennsylvania Benefit Integrity Support Center (PA-BISC). The ALJ determined that the appellant's request for a hearing was not timely filed, *i.e.*, within 60 days of receipt of the Qualified Independent Contractor's (QIC's) reconsideration decision, and that the appellant had not demonstrated good cause for its untimely filing. The appellant has asked the Medicare Appeals Council to review this action. The Appellant's request for review is entered into the record as Exhibit (Exh.) MAC-1.

The Council may deny review of an ALJ's dismissal or vacate the dismissal and remand the case to the ALJ for further proceedings. 42 C.F.R. § 405.1108(b). The Council may also dismiss the request for a hearing for any reason that the ALJ could have dismissed the request for hearing. 42 C.F.R. § 405.1108(c).

Between September 21, 2002, and November 9, 2005, the appellant provided various physician services to the beneficiary. The appellant submitted various claims to Medicare for payment for physician services including, among other things, penicillin

injections (HCPCS code J0550), electrocardiograms (CPT code 93000), routine venipunctures (HCPCS code G0001), office visits (CPT code 99214), blood occult (CPT code 82270), comprehensive audiometry (CPT code 92557), and collections of venous blood (CPT code 36415). See Exh. A, at 3-13, 171-337. The appellant's claims for Medicare coverage of these services were initially paid by the Medicare contractor. By letter dated September 9, 2008, the appellant was advised of an overpayment. *Id.* at 139.

The appellant requested redetermination of the overpayment decision and on December 4, 2008, the contractor issued numerous partially favorable redetermination decisions finding that some of the services at issue were covered under Medicare. *Id.* at 51-114. The appellant requested reconsideration by a QIC. Exh. A, at 50, 54, 58, 62, 66, 70, 74, 78, 82, 86, 90, 94, 98, 102, 107, 111. On May 27, 2009, the Qualified Independent Contractor (QIC) issued a partially favorable decision for coverage of certain claims at issue. *Id.* at 17-18.¹

In a letter dated July 27, 2009, and received by the ALJ office on August 4, 2009, the appellant requested an ALJ hearing on the remaining non-covered claims, arguing that, based on the beneficiary's medical history which included, among other things, insulin dependent diabetes mellitus, hypertension, renal insufficiency, and congestive heart failure, the services provided were needed to address the ongoing nature of the beneficiary's condition. Exh. A, at 3-13.

On August 25, 2009, the ALJ issued an order directing the appellant to show cause for untimely filing of its request for hearing. The ALJ cited 42 C.F.R. § 405.1002(a), which provides that a party must request a hearing before an ALJ within 60 days after the date of receipt of the QIC's reconsideration decision. Pursuant to 42 C.F.R. § 405.1002(a)(3), a party is presumed to have received a reconsideration decision within five days from the date of the decision. The ALJ further noted that, for calculating the 60-day filing deadline, a submission is considered filed "on the date it is received by the entity specified in the QIC's reconsideration. 42 C.F.R. § 405.1002(a)(4)." Exh. A, at 2. As previously noted, the QIC decision was issued on May 27, 2009. Therefore, the appellant is deemed to have received the QIC decision on or before June 1,

¹ The QIC's decision includes a chart which illustrates which of the services at issue were covered and non-covered.

2009 (Monday). The appellant's request for ALJ hearing was received on August 4, 2009, four days beyond the 60 days after the date of presumed receipt of the QIC decision. *Id.* at 3.

In an August 27, 2009, response to the ALJ's order to show cause, the appellant acknowledged that the request for ALJ hearing was filed beyond the 60-day period because, on his return from a family medical emergency overseas, he was met with 15 reconsiderations from the QIC which required a response. Exh. A, at 1. The appellant stated that "it was an overwhelming task to prepare 15 appeals. I prepared the latter in the order of complexity rather than in the order they were received in my office." *Id.* On September 1, 2009, the ALJ dismissed the appellant's request for hearing pursuant to 42 C.F.R. § 405.1052(a)(4) based upon a determination that the appellant had not shown good cause for the untimely filing of the request for hearing.

In his September 4, 2009, request for Council review, the appellant provided a more detailed explanation in response to showing good cause than that provided to the ALJ in his request for extension dated August 27, 2009. See Exh. A, at 392. Specifically, the appellant stated that he received a call on May 25, 2009, from *** advising of his elderly father's stroke and informing him that his father was in critical condition. Exh. MAC-1, at 1. The appellant states that he left immediately to attend to his father's medical needs, and did not return to the United States until July 18, 2009. *Id.* The appellant notes that, on his return, he found 15 QIC decisions awaiting him at this office which required immediate action. *Id.* The Council notes that the two months in which he was out of the country largely coincide with the sixty days during which he needed to file a request for hearing with the ALJ.

The regulations at 42 C.F.R. § 405.942(b)(3)(ii) provide that one basis for finding "good cause" for late filing is "[t]he party had a death or serious illness in his or her immediate family." In order to attend to his father's health and welfare, the appellant remained in *** for almost two months. Upon his return to the United States, not only did the appellant have to address the 15 QIC reconsideration decisions, but he also had to resume his practice in general.

Based on the appellant's request for review, the Medicare Appeals Council concludes that good cause has been shown for the untimely filing of the request for hearing. The Council remands

this case to the ALJ for further proceedings. The ALJ will offer the parties an opportunity for a hearing and will issue a decision on the merits of the coverage issues.

The ALJ may take further action not inconsistent with this order.

MEDICARE APPEALS COUNCIL

/s/ Gilde Morrisson
Administrative Appeals Judge

/s/ M. Susan Wiley
Administrative Appeals Judge

Date: October 2, 2009