Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Niklo Products, Inc.,	)	Date: November 20, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-06-50
	)	Decision No. CR1692
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION DISMISSING HEARING REQUEST

I dismiss the hearing request of Petitioner, Niklo Products, Inc. I do so because Petitioner does not have a right to a hearing before me. Even if Petitioner did have a right to a hearing, the hearing request is untimely and Petitioner has failed to establish good cause for its untimely request.

I. Background

By letter dated December 30, 2003, the Centers for Medicare & Medicaid Services (CMS), acting through the National Supplier Clearinghouse (NSC),[1] notified Niklo Products, Inc. (Petitioner) that its Medicare supplier number for Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) issued by NSC would be revoked. In the December 30, 2003 letter, NSC stated that the reason for the revocation

[1] NSC is the entity authorized by CMS to issue, revoke, and reinstate DMEPOS supplier numbers. If NSC revokes an entity's supplier number, NSC notifies the entity that revocation is effective 15 days after NSC mails notice of its determination. Payment is not allowed for items furnished by the supplier beginning with the effective date of revocation. 42 C.F.R. § 405.874(a) and (b).

of the supplier number was Petitioner's noncompliance with Supplier Standard numbers two (Petitioner was providing oxygen, diabetic supplies and diabetic footwear without notifying NSC) and ten (Petitioner had failed to provide information on a required insurance policy).

By letter dated January 15, 2004, Petitioner requested that its supplier number be reinstated. By letter dated April 28, 2004, NSC notified Petitioner that its supplier number was reinstated, effective April 28, 2004. By letter dated September 3, 2004, Petitioner requested that the reinstatement of its supplier number be made retroactive.

Petitioner sent a letter to NSC, dated October 24, 2005, with a courtesy copy to the Departmental Appeals Board (DAB), stating that its Medicare supplier number should never have been revoked and requesting that it be allowed to "retroactively charge to Medicare all billing statements that resulted between the dates of January 2004 thru April 2004." P. Ex. 3. The October 24, 2005 letter was received by the DAB, construed as a hearing request, and docketed as C-06-50. Thereafter, the case was assigned to me for hearing and decision.

On April 5, 2006, NSC submitted a letter accompanied by four exhibits, NSC Exhibits (NSC Exs.) 1-4. On April 7, 2006, I convened a prehearing conference. During the prehearing conference, I informed the parties that I was construing NSC's April 5, 2006 letter as a motion to dismiss. I informed Petitioner that it would have an opportunity to respond to the motion to dismiss. On April 24, 2006, Petitioner submitted its Response brief accompanied by five exhibits, Petitioner Exhibits (P. Exs.) 1-5. On May 19, 2006, NSC submitted a letter in reply accompanied by three additional exhibits which I have remarked as NSC Exs. 5-7. By letter dated June 5, 2006, Petitioner waived its right to file a sur-reply. I admit into evidence P. Exs. 1-5 and NSC Exs. 1-7. My decision is based on the parties' submissions, including exhibits and the applicable law.

II. Applicable Law

Section 1861 of the Social Security Act (Act) defines medical and other health services that are eligible for Medicare reimbursement by DMEPOS suppliers. Under section 1834(j)(1)(A) of the Act, "no payment may be made under this part . . . for items furnished by a supplier of medical equipment and supplies unless such supplier obtains (and renews at such intervals as the Secretary may require) a supplier number." Act, section 1834(j)(1)(A). Pursuant to section 1834(j)(1)(B) of the Act, "a supplier may not obtain a supplier number unless . . . the supplier meets revised standards prescribed by the Secretary . . . that shall include requirements that the supplier . . . meet such other requirements as the Secretary may specify." Act, § 1834(j)(1)(B)(ii)(IV).

CMS regulations set forth the conditions that a DMEPOS supplier must meet in order to receive payment for a Medicare-covered item. *See* 42 C.F.R. § 424.57(b) and (c). CMS will revoke a supplier's billing privileges if it does not meet the standards in 42 C.F.R. § 424.57(b) and (c). 42 C.F.R. § 424.57(d). Additionally, a supplier cannot be paid for an item furnished during the period in which its billing privileges were revoked. 42 C.F.R. § 424.57(b)(3).

Section 1866(j) of the Act, as amended by section 936(b)(3) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, authorized the Secretary of Health and Human Services (Secretary) to establish a process for the enrollment in the Medicare program of providers of services and suppliers. Specifically, section 1866(j)(2) of the Act grants "[a] provider of services or supplier whose application to enroll (or, if applicable, to renew enrollment) under this title is denied" a "hearing and judicial review of such denial under the procedures that apply under subsection (h)(1)(A)."[2] Those procedures are set out at 42 C.F.R. Part 498, *et seq*. and provide for hearings by administrative law judges (ALJs) and review by the DAB.

The DAB has held that section 1866(j)(2) of the Act gives appeal rights to suppliers. "Section 1866(j)(2) of the Social Security Act (the Act) gives suppliers appeal rights, for certain determinations involving enrollment, using the procedures that apply under section 1866(h)(1)(A) of the Act. Those procedures are at 42 C.F.R. Part 498 and provide for ALJ [administrative law judge] hearings and Board review."[3] *MediSource Corporation*, DAB No. 2011, at 2 (2006). Further, the Board has recognized the procedures and the burden of persuasion established by the Secretary in the Program Integrity Manual (PIM, Pub. 100-08) at Chapter 10, § 19. "The Medicare Provider Integrity Manual provides: 'The burden of persuasion is on the . . . supplier . . . to show that its enrollment application was incorrectly disallowed or that the revocation of its billing number was incorrect.' [Citing PIM, Ch. 10, § 19.B.] This provision is consistent with the Board's conclusion in provider appeals under 42 C.F.R. Part 498 that a provider must prove substantial compliance by the preponderance of the evidence, once CMS has established a prima facie case that the provider was not in substantial compliance with relevant statutory or regulatory provisions." *Id.* at 2-3.

---

[2] Previously, supplier appeals were governed by 42 C.F.R. § 405.874, which provided for review by a fair hearing officer and then a CMS official, designated by the Administrator of CMS.

[3] A proposed rule, not yet effective, would extend to suppliers the due process procedures of 42 C.F.R. Part 498, including the right to a hearing by an ALJ. *See* 72 Fed. Reg. 9479 (March 2, 2007).

III. Issues

The issues in this case are whether Petitioner has a right to a hearing and, if so, whether the hearing request should be dismissed as untimely.

IV. Discussion

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading. I discuss each Finding in detail.

A. Petitioner has no right to a hearing before me.

By letter dated December 30, 2003, CMS, acting through NSC, notified Petitioner that its DMEPOS Medicare supplier number issued by NSC would be revoked. In the December 30, 2003 letter, NSC stated that the reason for the revocation of the supplier number was Petitioner's noncompliance with Supplier Standard numbers two (Petitioner was providing oxygen, diabetic supplies and diabetic footwear without notifying NSC) and ten (Petitioner had failed to provide information on a required insurance policy).

The December 30, 2003 letter informed Petitioner of its right to contest the revocation:

> You have the right to contest this decision. You have two options. If you think that NSC has made a factual error or you have corrected the problem, you may submit a request for reconsideration. If you decide to do so, you have 60 days from the postmark of this notice to file such a written request. You may complete a corrective action plan and provide sufficient evidence that you are in compliance with the Medicare requirements. Upon satisfactory completion of a corrective plan to which CMS has agreed, the NSC may reinstate your supplier number.

> The second option is the right to contest this decision by requesting a hearing. If you request a hearing, an independent fair hearing officer will conduct this hearing. A request for hearing must be made within 60 days from the postmark of this notice. The hearing officer's decision may be appealed to CMS for final administrative review within 60 days after the receipt of the decision.[4]
>
> Your request for a reconsideration or a hearing must be made in writing and sent to the following address:
>
> National Supplier Clearinghouse
> Attn: Hearings and Appeals
> P.O. Box 100142
> Columbia, S. C. 29202-3142

P. Ex. 4.

On January 15, 2004, Petitioner wrote a letter to NSC at the address referenced above. Petitioner's January 15, 2004 letter states that on October 24, 2003 it sent to NSC information about comprehensive liability insurance and also states that NSC claims "that we sell something that we have never done even though We [sic] are authorized to sell oxygen if we wanted to do so, but we are not interested and never have been." P. Ex. 5. Petitioner requested that its supplier number be reinstated in its January 15, 2004 letter. Petitioner's January 15, 2004 letter was a request for reconsideration to NSC and a corrective action plan providing evidence of compliance with Medicare's insurance requirement. Petitioner chose to take the first option when it was notified of the revocation of its supplier number in NSC's December 30, 2003 letter. Nothing in the December 30, 2003 letter stated that the two options were mutually exclusive. Petitioner, after prompt results from filing its corrective action plan did not materialize and having been specifically informed that there was a time limit to requesting a hearing by a fair hearing officer, could have also requested such a hearing. It did not do so.

By letter dated April 28, 2004, NSC reinstated Petitioner's supplier number, effective April 28, 2004. The April 28, 2004 letter notified Petitioner that its reinstated supplier number would not be retroactive to the original revocation date. This letter informed Petitioner that "[t]he reinstatement is effective immediately and will not be retroactive to

---

[4] The December 30, 2003 letter contained information about the reconsideration and appeal rights available to a supplier at that time. On December 30, 2003, suppliers did not have a right to a hearing before an ALJ at the DAB.

the original revocation date. Since you failed to notify the NSC of products or services you were billing to Medicare, your supplier number is effective the date the information on your application was verified, 4/28/04." P. Ex. 1. This letter did not inform Petitioner of any appeal rights. On April 28, 2004, suppliers did not have a right to a hearing before an ALJ at the DAB.

Petitioner claims that, upon receipt of the April 28, 2004 letter, it contacted NSC by telephone and spoke to a NSC representative. Petitioner claims that the NSC representative informed Petitioner that it would be receiving payment only for those services that were not in violation of DMEPOS supplier standards between January and April 2004, the time period from the date of revocation to the date of reinstatement. P. Brief (Br.) at 2. When Petitioner did not receive any payment, Petitioner claims that it contacted NSC again by telephone. Petitioner claims that a different NSC representative informed Petitioner that it would not be receiving payment for any services provided between January and April 2004. Petitioner further claims that it was not informed of any appeals rights during either of these telephone conversations. P. Br. at 3.

In addition, Petitioner claims that immediately after the second telephone conversation it sent a letter dated September 3, 2004 to NSC requesting payment for services between January and April 2004. P. Ex. 2. In its September 3, 2004 letter, Petitioner states that its supplier number was revoked because it was "handling orthotics and diabetic shoes and had not specifies [sic] it in our enrollment form." *Id.* Evidently, there was other communications or letters between the parties concerning orthotics and diabetic shoes that were not provided as exhibits to me. The September 3, 2004 letter does not refer to either of the telephone calls that Petitioner now claims it made to NSC or to receiving conflicting information about payment from NSC representatives. Petitioner claims that it never received a reply to its September 3, 2004 letter from NSC. P. Br. at 3.

After a period of almost 14 months, Petitioner sent a certified letter dated October 24, 2005 (P. Ex. 3) to NSC requesting payment for services rendered from January until April 2004. A courtesy copy of this letter was sent to the DAB. This letter was received by the Civil Remedies Division of the DAB, construed as a request for hearing, docketed, and assigned to me for hearing and decision.

Providers and suppliers were afforded hearing rights before ALJs at the DAB by section 1866(j)(2) of the Act. Section 1866(j)(2) of the Act was enacted by section 936(b)(3) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Public Law 108-173, which provides that "Section 1866(j)(2) of the Social Security Act . . . shall apply to **denials** occurring on or after such date (not later than 1 year after the date of the enactment of this Act as the Secretary specifies." (emphasis added). The one year period after the enactment of the Medicare Prescription Drug, Improvement, and Modernization Act ended on December 8, 2004.

CMS argues in its May 19, 2006 submission that NSC did not inform Petitioner of any appeal rights because Petitioner did not have any appeal rights. CMS indicates that Petitioner was reinstated under a corrective action plan. A supplier number may be reinstated after revocation when an entity completes a corrective action plan, to which CMS (through NSC) has agreed and provides sufficient assurance of its intent to comply fully with supplier standards. 42 C.F.R. § 405.874(f). NSC decides what day Petitioner is in compliance, and there is no appeal from that decision provided under 42 C.F.R. § 405.874.

I agree with the arguments advanced by CMS. First, on the dates that Petitioner's supplier number was revoked (December 30, 2003) and then reinstated (April 28, 2004), Petitioner did not have the right to appeal either the revocation or the reinstatement to any ALJ at the DAB. Act, section 1866(j)(2).

Second, the right to request a hearing is triggered by notice of one of the initial determinations enumerated at 42 C.F.R. § 498.3(b). Petitioner argues that it is entitled to appeal the reinstatement date citing 42 C.F.R. § 498.5(e) which provides that, "[a]ny supplier dissatisfied with any initial determination that the services subject to the determination no longer meet the conditions of coverage, is entitled to a hearing before an ALJ." However, administrative actions that do not amount to initial determinations, examples of which are cited at 42 C.F.R. § 498.3(d), do not trigger appeal rights. Petitioner's reliance on section 498.5(e) is misplaced. Section 498.5(e) applies to a denial or a revocation of a supplier number, not a reinstatement of a supplier number after a corrective action plan. In this case, reinstatement that occurs subsequent to the supplier's submission of a corrective action plan is an administrative action which does not trigger appeal rights. 42 C.F.R. §§ 405.874, 498.3(b), 498.5(e).

Section 1866(j)(2) of the Act does not give suppliers hearing rights before an ALJ in the case of a reinstatement that results after a supplier submits a corrective action plan. However, section 1866(j)(2) does give suppliers hearing rights before an ALJ following a hearing officer's decision. I agree with CMS's persuasive argument that under the regulations there is no appeal from the date NSC decides to reinstate a supplier number when it does so after a supplier submits a corrective action plan. 42 C.F.R. § 405.874(f). Therefore, Petitioner was not apprised of any hearing rights in the reinstatement letter of April 28, 2004 because it was not entitled to a hearing before an ALJ and the time had run for it to request a hearing before a fair hearing officer. As previously noted, Petitioner was specifically informed of its right to a hearing before a fair hearing officer and was specifically informed of the time limits in which to request a fair hearing. However, Petitioner did not request a fair hearing. I also note that Petitioner did not seek permission to rebut CMS's argument on these critical points.

Third, this case involves a reinstatement of a supplier number and not a denial. Section 1866(j)(2) of the Act specifically indicates that it applies to "denials." Section 1866(j)(2) does not apply to reinstatements of supplier numbers. After receipt of the notice letter informing Petitioner of its reinstatement, Petitioner allegedly contacted NSC twice by telephone, and then sent a letter requesting reconsideration of payments for services on September 3, 2004. P. Ex. 2. Petitioner did not receive a response to its request for reconsideration and more than a year later sent another request to NSC with a courtesy copy to the DAB on October 24, 2005. Petitioner never requested a hearing before an ALJ in any of its requests for reconsideration. The only time Petitioner dealt with the ALJ hearing process was when the parties addressed CMS's motion to dismiss.

B. Assuming arguendo that Petitioner does have a right to a hearing, Petitioner's hearing request was not timely filed.

The regulations are clear regarding the requirements for timely filing a request for hearing. The regulation at 42 C.F.R. § 498.40(2) provides:

> The affected party or its legal representative or other authorized official 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 . . . .

The 60 days run from the date of receipt by the affected party, which is presumed to be five days after the date of the notice unless it is shown that the notice was received earlier or later. 42 C.F.R. §§ 498.40(a)(2) and 498.22(b)(3). I have discretion to extend the period for filing a request for hearing if the petitioner files a "written request for extension of time stating the reasons why the request was not filed timely," and I find that good cause for the late filing is stated. 42 C.F.R. § 498.40(c). The requirement for timely filing a written request for hearing is commonly viewed as the means by which administrative finality can be achieved, *i.e.*, if there is no deadline for filing and an affected party may file at anytime, the record on an action may never be closed.

Petitioner did not file a hearing request within 60 days. The initial notice letter to Petitioner was dated December 30, 2003. The date of the letter reinstating Petitioner's supplier number was April 28, 2004. However, the letter sent to the DAB was dated October 24, 2005. This letter, as mentioned earlier in this decision, did not specifically request a hearing but merely requested payment for services from January to April 2004. For purposes of this section of my decision I will assume that the October 24, 2005 letter amounted to a hearing request and that Petitioner was entitled to a hearing before me.

I am authorized to dismiss a request for hearing if it was not timely filed and I have not granted an extension of the period to file. 42 C.F.R. § 498.70(c). There is no dispute that Petitioner's hearing request was dated eighteen months after the letter reinstating its supplier number and was clearly untimely.

C. Petitioner has not shown "good cause" to extend the time for filing a hearing request.

The regulations governing the timing of hearing requests in cases involving CMS state explicitly that a request must be filed within 60 days of the date a party receives CMS's notice. 42 C.F.R. § 498.40(a)(2). A request is presumed to have been received five days after the date of its mailing. *Id*.; 42 C.F.R. § 498.22(b)(3). If a request is untimely filed an ALJ must dismiss it unless a facility establishes good cause for its failure to file the request timely. 42 C.F.R. §§ 498.40(c)(2); 498.70(c).

The regulations do not define the term "good cause." It is settled, however, that good cause for not filing a hearing request timely consists only of an event or events that are beyond a party's ability to control, but for which, that party would have been able to file its request timely. *Hospicio San Martin*, DAB No. 1554 (1996).

Petitioner has not established good cause here because it has not proven that it failed to file its request only as a consequence of an event or events that were beyond its ability to control. Petitioner offers three grounds as good cause for its untimely hearing request in its response to CMS's motion to dismiss: the language barrier that exists between those in Puerto Rico interacting with agencies of the Unites States; the alleged incorrect information that was provided to Petitioner by an NSC representative based on a telephone call made shortly after receiving the April 28, 2004 letter where Petitioner was incorrectly informed that it would be receiving payment only for those services that were not in violation of DMEPOS supplier standards between January and April 2004; and, that Petitioner was not notified of its appeal rights and of the time limits for filing a hearing request in the April 28, 2004 reinstatement letter or any time afterward.

Petitioner's first ground for good cause, the language barrier, does not amount to good cause. It is completely within Petitioner's control to acquire assistance in understanding NSC's communications to it. The Commonwealth of Puerto Rico is an unincorporated territory of the United States, and as such, entities in Puerto Rico have frequent contact and communication in English with agencies in the United States. Petitioner cannot rely on this ground as good cause for late filing.

Petitioner's second ground for good cause is the alleged incorrect information it received. A NSC representative, allegedly in a telephone call made shortly after receiving the April 28, 2004 letter, incorrectly informed Petitioner that it would be receiving payment only for those services that were not in violation of DMEPOS supplier standards between January and April 2004. Petitioner provides no evidence of this telephone call. When Petitioner did not receive any payment, Petitioner claims that it contacted NSC again by telephone. Petitioner claims that a different NSC representative informed Petitioner that it would not be receiving payment for any services provided between January and April 2004. Petitioner provides no evidence of this second telephone call. Petitioner further claims that it was not informed of any appeals rights during either of these telephone conversations. P. Br. at 3. Immediately after the second telephone conversation, Petitioner sent a letter dated September 3, 2004 to NSC requesting payment for services between January and April 2004. P. Ex. 2. The September 3, 2004 letter does not refer to either of the telephone calls that Petitioner now claims it made to NSC, nor does it claim that Petitioner received conflicting information on payment from NSC representatives. Petitioner has presented no evidence that these telephones calls were ever made. Even the September 3, 2004 letter which was written immediately after the alleged second telephone call does not refer to either telephone call. Petitioner cannot claim reliance on incorrect information given to it verbally from some unknown NSC representative for which there is no evidence. I find Petitioner's second ground does not amount to good cause for filing late.

I have previously addressed CMS's alleged failure to notify Petitioner of its appeals rights in this decision. I stated previously in this decision that Petitioner cannot rely on this alleged failure as good cause because it was not entitled to an appeal at that time. However, since I am assuming *arguendo* that Petitioner did have appeal rights, it was completely in Petitioner's control to vigorously pursue payment for the time period between January and April 2004. Instead, the only evidence that I have before me is that Petitioner sent one letter on September 3, 2004 (five months after the April 28, 2004 reinstatement letter) and then nothing else until October 25, 2005 (18 months after the reinstatement letter). Petitioner had the NSC address. Petitioner was aware of at least the second option of requesting a hearing before an independent fair hearing officer mentioned in the original December 30, 2003 notice letter of revocation. Petitioner did not attempt to request such a hearing and did nothing for almost 14 months between its September 3, 2004 letter and its October 25, 2005 letter. I find that it was completely within Petitioner's sole control to vigorously pursue payment and it did not do so.

V. Conclusion

For the foregoing reasons, Petitioner's request for hearing is dismissed.

/s/
Alfonso J. Montano
Administrative Law Judge