Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Bryant H. Hudson, III, M.D.
Docket No. A-12-31
Decision No. 2442
March 1, 2012

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Bryant H. Hudson, III, M.D. (Petitioner) appeals the December 9, 2011 decision of Administrative Law Judge (ALJ) Keith W. Sickendick dismissing Petitioner's request for a hearing. *Byrant H. Hudson, III, M.D.*, DAB CR2472 (2011) (ALJ Decision). Petitioner requested a hearing before the ALJ to dispute his five-year exclusion from participation in all federal health care programs imposed by the Inspector General for the Department of Health and Human Services (I.G.). The ALJ concluded that Petitioner abandoned his hearing request under 42 C.F.R. § 1005.2(e)(3) by failing to meet the November 4, 2011 filing deadline for a brief and proposed exhibits established in a "Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence" (Prehearing Order), and by failing to respond to the ALJ's November 14, 2011 Order (November 14 Order) that required Petitioner to file a brief and proposed exhibits within 14 days. *Id.* at 2.

Petitioner, appearing *pro se*, argues on appeal that he was unable to meet the filing deadlines or respond to the ALJ Order because of representation issues with his previously-retained counsel, financial problems, and family medical emergencies. For the reasons explained below, we conclude that the record before us shows that Petitioner abandoned his hearing request. Therefore, we uphold the ALJ's dismissal of Petitioner's hearing request.

Applicable Legal Standards

The Social Security Act (Act) requires that the Secretary of Health and Human Services (Secretary) exclude individuals from participation in all federal health care programs based on certain criminal convictions. Act § 1128(a).[1] The Secretary must exclude an individual "that has been convicted, under Federal or State law, of a criminal offense

[1] The current version of the Act is available at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. On this website, each section of the Act contains a reference to the corresponding chapter and section in the United States Code.

relating to neglect or abuse of patients in connection with the delivery of a health care item or service." Act § 1128(a)(2). The Act defines "convicted" to include "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court." Act § 1128(i)(3). Any mandatory exclusion imposed pursuant to section 1128(a) must be for a minimum of five years. Act § 1128(c)(3)(B).

The Secretary has delegated exclusion authority to the I.G. by regulation. *See* 42 C.F.R. § 1001.101(b). When the I.G. imposes any type of exclusion, whether mandatory or permissive, the individual subject to the exclusion may request a hearing before an ALJ. 42 C.F.R. §§ 1001.2007(a), 1005.2(a). Section 1001.2007(a) limits the ALJ's review of a mandatory minimum five-year exclusion to whether the "basis for the imposition of the sanction exists." Section 1001.2007(a)(1)(i). Section 1005.2 outlines the requirements that a sanctioned party must meet when requesting a hearing before the ALJ. This section also lists four situations where an ALJ "will dismiss a hearing request" without a hearing, including, as relevant here, when the "petitioner or respondent abandons his or her request for a hearing." Section 1005.2(e)(3).

Case Background

The following facts are undisputed and drawn from the record before the ALJ as well as the ALJ Decision. On December 9, 2010, Petitioner entered a guilty plea in the Circuit Court for Montgomery County, Alabama to one count of first-degree sexual abuse. I.G. Ex. 2, at 2. According to the Medical Licensure Commission of Alabama, the conduct underlying the criminal charge against Petitioner related to "inappropriate sexual contact with a patient in a hospital setting." I.G. Ex. 4, at 1. By letter dated June 30, 2011, the I.G. notified Petitioner that the I.G. was excluding Petitioner from participation in all federal health care programs for a period of five years. I.G. Ex. 1. Citing section 1128(a)(2) of the Act, the I.G. stated that the exclusion was based on Petitioner's conviction of "a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service." *Id.*

On July 12, 2011, an Alabama-based attorney filed a hearing request on behalf of Petitioner, in which the attorney asserted that he represented Petitioner. P. Req. for Hr'g at 1. On August 3, 2011, the ALJ convened a prehearing teleconference. Prehearing Order at 1 (unnumbered). The Alabama attorney appeared (over the telephone) on behalf of Petitioner. *Id.* The ALJ issued his Prehearing Order the following day, which established the filing requirements and deadlines for both parties. *Id.* at 2 (unnumbered). On September 19, 2011, the I.G. timely filed a motion for summary judgment, supporting brief, and four proposed exhibits. Petitioner's filing deadline, November 4, 2011, passed without Petitioner filing a response to the I.G.'s motion, a brief, or any proposed exhibits.

On November 14, 2011, the ALJ issued an order that stated the Attorney Advisor assigned to assist the ALJ contacted Petitioner's attorney on November 10, 2011 and that Petitioner's attorney "informed my Attorney Advisor that he no longer represents Petitioner and that he would not be filing a notice of withdrawal." November 14 Order at 1. The ALJ then wrote:

> I sua sponte grant Petitioner an extension of time to file his response to the I.G.'s motion for summary judgment. Petitioner must file his response to the I.G.'s motion with supporting memorandum and exhibits no later than **November 28, 2011**. If no response is received from Petitioner, I will either treat his request for hearing as abandoned and dismiss his request pursuant to 42 C.F.R. § 1005.2(e)(3) or I will proceed to decide the case on the current record.

Id. (emphasis in original).

On December 9, 2011, 35 days after Petitioner's original filing deadline established in the Prehearing Order and 11 days after the extended filing deadline, the ALJ issued his decision dismissing Petitioner's hearing request. The ALJ noted the circumstances of the Alabama attorney's withdrawal from the case as well as the extended filing deadline granted to Petitioner *sua sponte*, which included the warning "that, if no response was received, I may treat his request for hearing as abandoned and dismiss his request pursuant to 42 C.F.R. § 1005.2(e)(3)." ALJ Decision at 2. The ALJ stated, "To date, my office has not received a response from Petitioner." *Id.* Citing Petitioner's failure to respond to the I.G.'s motion for summary judgment and failure to meet the established filing deadlines, the ALJ found that "Petitioner has abandoned his request for a hearing," and dismissed the hearing request. *Id.* Petitioner timely appealed the ALJ Decision to the Board.

Standard of Review

Our standard of review in the appeal of an exclusion is established by regulation. We review a disputed issue of law as to whether the initial decision is erroneous. 42 C.F.R. § 1005.21(h). We review a disputed issue of fact as to whether substantial evidence in the record as a whole supports the initial decision. *Id.* Even if we find the ALJ's conclusion was erroneous, we "disregard any error or defect that does not affect the substantial rights of the parties." 42 C.F.R. § 1005.23.

Analysis

On appeal, Petitioner does not directly dispute the ALJ's conclusion that he abandoned his hearing request. Rather, Petitioner offers various explanations for why he missed the filing deadlines, including the underlying financial disputes between the attorney and Petitioner, the attorney's withdrawal as Petitioner's counsel, Petitioner's recent financial troubles, and the recent death of Petitioner's mother. P. Notice of Appeal (NOA) at 1 (unnumbered).[2] Taking into account that Petitioner is *pro se* on appeal, we read his explanations for the missed filing deadlines as his general disagreement with the ALJ's conclusion and, thus, as his argument that the ALJ erred by finding that Petitioner abandoned his hearing request. As explained below, we conclude that the record before the ALJ was incomplete and does not adequately support the ALJ's finding that Petitioner, who became a *pro se* litigant after filing his hearing request, abandoned his hearing request. We also conclude, however, that the record before us on appeal, which includes certain concessions Petitioner makes in his notice of appeal, supports a conclusion that Petitioner did, in fact, abandon his hearing request.

The procedures governing appeals of I.G. exclusion cases, found in 42 C.F.R. Part 1005, do not expressly define "abandon" or "abandonment," or, unlike the hearing procedures in 42 C.F.R. Part 498, explain the circumstances when an ALJ may find a petitioner abandoned his or her hearing request. The ordinary meaning of "abandonment" is the "relinquishment of a right or interest with the intention of never again claiming it." Black's Law Dictionary 2 (8th ed. 2004); *see Kermit Healthcare Center*, DAB No. 1819, at 6 (2002) (applying the Black's Law Dictionary definition of "abandonment" to 42 C.F.R. § 498.69); *see also F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (applying the Black's Law Dictionary definition of a statutory term to elicit its "ordinary and natural meaning"). Evidence of a whether a petitioner has abandoned a hearing request may not always be straightforward, and may often require an ALJ to draw inferences from a petitioner's inaction or omissions, including the failure to meet certain requirements about which the petitioner knew or should have known.

In appeals governed by 42 C.F.R. Part 498, the Board has likened the dismissal of a hearing request for abandonment to the dismissal of a claim under Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute a claim.[3] *See, e.g.*, *Osceola* at 11-12. Citing numerous federal appellate court decisions that explain the harshness of

[2] Petitioner, *pro se*, filed a three-page letter as a means of disputing the ALJ's dismissal of Petitioner's hearing request. We construe this letter to be Petitioner's notice of appeal as well as his supporting arguments required under 42 C.F.R. § 1005.21(a), (c).

[3] Part 498 applies to appeals of determinations that affect participation in the Medicare program and to determinations that affect the participation of certain facilities in the Medicaid program.

dismissing a claim under Rule 41(b), the Board has emphasized that dismissing a hearing request is substantial insofar as it forecloses a party's ability to have a hearing before an ALJ. *See Kermit* at 8-9 (citing *McNeal v. Papasan*, 842 F.2d 787 (5th Cir. 1988)); *Chateau Nursing and Rehabilitation Center*, DAB No. 2427, at 8 (2011) (citing *Osceola* at 11-12). The impact on a petitioner's statutory right to a hearing is no different in a dismissal for abandonment under section 1005.2(e)(3). Dismissal for abandonment under section 1005.2(e)(3) precludes the aggrieved petitioner from exercising any further appeal rights, and imposes the exclusion without further review. *See* 55 Fed. Reg. 12,205, 12,212 (1990) ("If such party . . . abandons his or her request for a hearing, the ALJ is required to dismiss the hearing request. In such a case, the CMP or exclusion would become final with no further appeal permitted."). Because it terminates an important statutory right to review, the dismissal of a hearing request for abandonment in I.G. exclusion cases should not be based on minor omissions or shortcomings of a petitioner. *See Osceola* at 11-12 (citing federal cases that require "willful disobedience" for dismissal and asserting that dismissal is "appropriate only in extreme circumstances"); *see also Kermit* at 7 ("[S]aying that one untimely submission will be 'considered evidence of abandonment' is not sufficiently clear to serve as sufficient warning that dismissal might be imminent."). Rather, for an ALJ to determine that a petitioner has abandoned his or her hearing request and is subject to dismissal under section 1005.2(e)(3), the record should contain evidence of serious or persistent inaction or omissions on the part of the petitioner from which the ALJ may draw a reasonable inference that the petitioner abandoned his or her hearing request. This approach is consistent with that used by the Board and federal courts of appeal reviewing dismissals for abandonment and failure to prosecute a claim.

In this case, Petitioner does not dispute that neither he nor his former attorney filed a response to the I.G.'s motion for summary judgment, a supporting brief, or any proposed exhibits to the ALJ as required. However, the attorney's withdrawal as counsel for Petitioner, which was without notice to the ALJ, called into question whether Petitioner could meet the filing requirements and deadlines established in the Prehearing Order. The November 14 Order, issued *sua sponte* by the ALJ, thus permitted Petitioner an additional 14 days to file the required documents or otherwise risk dismissal of the hearing request for abandonment.[4] Subsequently, when Petitioner did not file any documents by the extended deadline or request an additional extension, the ALJ concluded that this failure showed Petitioner had abandoned his hearing request. ALJ Decision at 2.

[4] The November 14 Order also stated that the ALJ would consider a request for extending the new filing deadline of November 28, 2011 so long as counsel for the I.G. had been consulted beforehand about the extension request. November 14 Order at 2.

The record below, however, contains insufficient documentation relating to factors for determining whether Petitioner abandoned his hearing request. Most of these inadequacies are rooted in the Alabama attorney's seemingly sudden and unannounced departure from the case and relate to whether Petitioner knew or should have known of the filing requirements and deadlines. Petitioner did not appear at the prehearing conference, nor was the Prehearing Order mailed to him. *See* Prehearing Order at 1, 4 (unnumbered). Counsel for the I.G. served the motion for summary judgment, supporting brief, and proposed exhibits on Petitioner's former attorney, not on Petitioner. Nothing in the record below shows that Petitioner knew of these documents or had knowledge of their contents or directives from the counsel of record.[5]

According to the November 14 Order, the phone call between the Attorney Advisor and the Alabama attorney occurred six days after Petitioner's original filing deadline. Nothing in the record below indicates when the attorney actually ceased representing Petitioner in this case, or whether he gave Petitioner the relevant documents. Moreover, the record before the ALJ does not contain any evidence that Petitioner *received* a copy of the November 14 Order addressed to him, such as a certified mail return receipt or delivery confirmation. Absent evidence in the record below showing that Petitioner received the order, the ALJ could not reasonably infer from Petitioner's failure to file a response that Petitioner had to abandoned his hearing request. As discussed below, however, the record before us – including certain concessions Petitioner makes in his notice of appeal – amply supports such a conclusion.

In his appeal to the Board, Petitioner does not deny receiving the Prehearing Order, the I.G.'s motion for summary judgment, brief, and proposed exhibits, or the November 14 Order. Petitioner acknowledges that he did not file any of the required submissions, and refers to "the letters from Washington" and "the documents." NOA at 2 (unnumbered). Specifically, Petitioner states that he "lost track of timing of the letters from Washington in the midst of the tremendous money pressure and no legal representation." *Id.* He also states that the "time lapse of the documents certainly became clouded due to [his] mother's lengthy illness." *Id.* Petitioner adds that "I do realize my responsibility to have

[5] We recognize the general principle that "each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts of which can be charged upon the attorney." *Irwin v. Dep't of Veterans Administration*, 498 U.S. 89, 92 (1990) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962)) (internal quotation marks omitted). Under most circumstances, this principle would reasonably allow the ALJ to have inferred that Petitioner had knowledge of the Prehearing Order and I.G. brief and exhibits. It would be especially harsh, however, for the ALJ to rely on knowledge imputed to Petitioner under the circumstances here. The Alabama attorney's failure to notify the ALJ of his withdrawal and refusal to file a notice of withdrawal calls into question how he terminated the attorney-client relationship in this case, and whether the attorney fulfilled his professional responsibility to return all of the relevant documents to Petitioner. *See* Model Rules of Prof'l Conduct R. 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such . . . surrendering papers and property to which the client is entitled . . . ."); *see also* Ala. Rules of Prof'l Conduct R. 1.16(d) (same).

responded to these letters in a more timely fashion" and acknowledges his "inaction during these past 3 to 4 months." *Id.* These explanations indicate that Petitioner was aware there were deadlines for filing his responses to the ALJ's orders, but chose to give priority to other matters despite having received information about the potential consequences. Moreover, these explanations demonstrate that Petitioner did, in fact, receive at least the ALJ's orders requiring Petitioner to meet certain deadlines, a fact that was unclear in the record below.

Although it not clear whether Petitioner received the I.G.'s motion for summary judgment, brief, and proposed exhibits, both the Prehearing Order and the November 14 Order imposed an obligation on Petitioner – which he acknowledges in his notice of appeal – to file something with the ALJ, even if it was a request for clarification or a request to have the I.G.'s submissions sent to him. However, Petitioner failed to file anything in response to the explicit directions of the ALJ. Despite the excuses Petitioner proffers on appeal, none suffice to explain why Petitioner waited until after the ALJ dismissed the hearing request to notify anyone about his situation. If Petitioner had intended to pursue his appeal but the loss of his counsel and his mother's serious illness in fact impeded his ability to meet the filing deadlines, he could have easily notified the ALJ about these impediments and requested an extension. Indeed, the ALJ had stated in the November 14 Order that he would consider a request for a further extension, but Petitioner failed to make any such request.

Moreover, the lack of a cognizable challenge to the I.G.'s exclusion of Petitioner in this case makes it more likely that Petitioner did at one time decide to abandon his appeal, however much he appears to regret that decision now. Petitioner's only argument in his hearing request to the ALJ was a collateral attack on his conviction. *See* P. Req. for Hr'g at 1 (describing the results of a polygraph examination and asserting that Petitioner "did not commit the acts described by the victim" despite entering a guilty plea). By regulation, the ALJ is precluded from considering any collateral attacks on a conviction in the appeal of an exclusion. 42 C.F.R. § 1001.2007(d). Moreover, the ALJ has no equitable authority to disregard the scope of review in exclusion appeals based on Petitioner's request for the ALJ to "do the right thing." *See* 42 C.F.R. § 1001.2007(a)(1); P. Req. for Hr'g at 2. Petitioner does not dispute that he was "convicted" within the meaning of section 1128(i) of the Act because he pled guilty to first-degree sexual abuse in the Circuit Court for Montgomery County, Alabama. I.G. Ex. 2, at 2. Petitioner does not dispute that his conviction was for first-degree sexual abuse against a patient in a hospital setting. I.G. Ex. 4, at 1. The lack of any sufficient challenge to the exclusion makes it more likely that Petitioner had, in fact, abandoned his hearing request after his attorney withdrew than if his request had substantial merit.

Conclusion

For the foregoing reasons, we uphold the ALJ's dismissal of Petitioner's hearing request for abandonment.

/s/
Stephen M. Godek

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member