

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Immanuel's Healthcare,)	
(CCN: 67-5052),)	Date: August 4, 2008
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-159
)	Decision No. CR1825
Centers for Medicare & Medicaid)	
Services.)	

DECISION

This matter is before me on a motion to dismiss (Motion) filed by the Centers for Medicare & Medicaid Services (CMS). CMS filed a motion to dismiss dated January 7, 2008, seeking dismissal of Immanuel's Healthcare (Petitioner or facility) November 30, 2007 hearing request. On April 7, 2008, CMS filed four exhibits that should have accompanied CMS's Motion. CMS Exhibits (CMS Ex.) 1-4 are admitted, without objection. Petitioner submitted a response to the Motion on April 23, 2008. Petitioner did not submit exhibits with its response. For the reasons discussed below, I grant CMS's Motion and dismiss Petitioner's request for hearing.

I. Background

Petitioner is a skilled nursing facility in Fort Worth, Texas, and is authorized to participate in the Medicare and Medicaid programs. Petitioner is required to be in substantial compliance with program requirements to remain a participant. On August 2, 2007, the Texas Department of Aging and Disability Services (DADS or state agency) completed a survey and found that the facility was not in substantial compliance with program requirements. On September 12, 2007, CMS notified Petitioner that it was not in substantial compliance with program requirements, and that it was imposing a per instance Civil Money Penalty in the amount of \$10,000 and that Petitioner would lose approval of its Nurse Aide Training and Competency Evaluation Program. CMS further informed Petitioner that if it disagreed with this determination, it may request a hearing before an administrative law judge (ALJ) and that the procedures governing this process are set out in 42 C.F.R. § 493.40, *et seq.* CMS Ex. 2. CMS informed Petitioner that "[a] written request for a hearing must be filed no later than November 11, 2007." *Id.*

Petitioner requested a hearing by letter dated November 30, 2007, indicating that it would like to appeal the findings of non-compliance related to Tags F-333 and F-425 that led to the enforcement action. On December 13, 2007, I issued an Acknowledgment and Initial Pre-Hearing Order that set forth procedures and a schedule for the initial development of the case. On January 2, 2008, CMS counsel filed his notice of appearance. On January 8, 2008, CMS counsel filed a motion to dismiss for failure to file a timely request for hearing. On or about April 1, 2008, I notified CMS that the exhibits referred to in its motion to dismiss were not submitted along with its Motion in conformance with Civil Remedies Division (CRD) Procedures. On April 8, 2008, CMS submitted an original and two copies of its exhibits for the Motion to the CRD and a copy of the exhibits for the Motion to Petitioner. On April 22, 2008, Petitioner faxed a response to CMS's Motion. CMS did not submit a reply to Petitioner's response.

After consideration of the written arguments and documentary evidence submitted by the parties, I grant CMS's motion to dismiss. In doing so, I find that the hearing request was untimely filed and the time for filing a request for hearing has not been extended as Petitioner has not shown good cause for its failure to file a timely hearing request.

II. Issues

- A. Whether Petitioner filed a timely request for hearing; and if not
- B. Whether Petitioner has shown good cause for extending the time to file a request for hearing.

III. Applicable Law and Regulations

In cases involving CMS, a party is entitled to a hearing only if that party files its request within the time limits established by 42 C.F.R. § 498.40(a)(2), unless the period for filing is extended. In order to be entitled to a hearing, a party must file its request within 60 days from receipt of a notice of a determination by CMS to impose a remedy. The date of receipt of a notice is presumed to be five days after the date on the notice, unless there is a showing of actual receipt on an earlier or later date. 42 C.F.R. § 498.22(b)(3). An ALJ may extend the time within which a hearing request may be filed based on a showing of good cause to justify an extension of time. 42 C.F.R. § 498.40(c)(2). An ALJ may dismiss a request for hearing which is not timely filed. 42 C.F.R. § 498.70(c).

IV. Findings and Discussion

I make findings of fact and conclusions of law (Findings) to support my decision to dismiss the request for hearing. Each finding is noted below in bold, italic face, followed by a discussion of each Finding.

A. CMS notified Petitioner of its action on September 12, 2007.

By notice letter (notice) dated September 12, 2007, CMS sent Petitioner the notice of penalties via facsimile. CMS Ex. 2. The notice is an “initial, reconsidered, or revised determination” by CMS. 42 C.F.R. §§ 488.406, 498.3(b)(13), 498.5, 498.40. The notice clearly indicates that it is being provided by facsimile and that “no hard copy [would] follow.” CMS Ex. 2, at 1. This notice constituted agency action from which Petitioner’s right to appeal arose.

B. Petitioner received CMS’s notice letter on September 12, 2007.

There is a regulatory presumption that the affected party has received the notice five days after the date on the notice, unless it is shown that the notice was received earlier or later. 42 C.F.R. §§ 498.40(a)(2), 498.22(b)(3). Also, in light of *Riverview Village*, DAB No. 1840 (2002), notice is determined to be the date the facsimile is sent if the notice has not been conveyed by any other means. CMS’s notice letter was sent only by facsimile, and no evidence has been provided by Petitioner that the notice was received on any other date other than the same day it was sent. Petitioner did not address in its hearing request any delay in receiving the notice or when the notice was received. Therefore, Petitioner received CMS’s notice on September 12, 2007.

C. Petitioner’s hearing request was filed on November 30, 2007.

Petitioner’s hearing request is dated November 30, 2007, and was received by the Civil Remedies Division on that same date.

D. Petitioner’s hearing request was filed more than 60 days after receipt of CMS’s notice letter, and was therefore untimely.

Section 498.40(a)(2) of 42 C.F.R. expressly provides that:

[an] affected party or its legal representative or other authorized official must file the request for hearing in writing within 60 days from the receipt of the notice of initial, reconsidered, or revised determination unless that period is extended

The latest date by which Petitioner could have filed a timely hearing request consistent with 42 C.F.R. § 498.40(a)(2) was November 12, 61 days after September 12, 2007.* Petitioner’s hearing request was filed on November 30, 2007. The filing of Petitioner’s request was clearly beyond the 60 days stipulated in the regulations. Therefore, Petitioner’s hearing request was untimely.

* 60 days after September 12, 2007, was November 11, 2007, which was a Federal holiday.

E. Petitioner has not shown good cause for its untimely hearing request.

Petitioner has not filed a request for an extension of time for filing its request for hearing pursuant to 42 C.F.R. § 498.40(c)(1). To extend the period for filing, the affected party “may file a written request for extension of time stating the reasons why the request was not filed timely.” 42 C.F.R. § 492.40(c)(1). I may extend the time for filing the request “for good cause shown.” 42 C.F.R. § 498.40(c)(2). Good cause has been interpreted by the Departmental Appeals Board as circumstances beyond the ability of the party litigant to control. *Hillcrest Healthcare, L.L.C.*, DAB No. 1879 (2003); *Hospicio San Martin*, DAB No. 1554 (1996).

Petitioner’s administrator asserted in her response to CMS’s motion that she thought that the notice letter was from DADS and did not realize the notice letter was from Centers for Medicare & Medicaid Services. She also acknowledges in her response that Petitioner’s hearing request was untimely.

I find that Petitioner has not demonstrated good cause for its untimely hearing request. Petitioner has not shown that it filed the hearing request after the 60-day requirement due to circumstances beyond its control. The mistake as to whether CMS or the state agency sent the notice letter cannot be considered as good cause, therefore I must grant CMS’s motion to dismiss.

V. Conclusion

Based on the applicable law and undisputed facts, I conclude that Petitioner’s hearing request was untimely filed, and good cause does not exist to extend the time for filing. CMS’s motion to dismiss is granted.

/s/
José A. Anglada
Administrative Law Judge