

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

---

In the Case of:	)	
	)	
Capitol House Nursing and Rehab	)	Date: November 17, 2008
Center (CCN: 19-5476),	)	
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-475
	)	Decision No. CR1866
Centers for Medicare & Medicaid	)	
Services.	)	

---

**DECISION DISMISSING REQUEST FOR HEARING**

I dismiss the hearing request filed by Petitioner, Capitol House Nursing and Rehab Center, a skilled nursing facility doing business in the State of Louisiana, as a consequence of Petitioner’s persistent failure to comply with the requirements governing hearing requests stated at 42 C.F.R. § 498.40(b) and also, because of the absence of any good cause for Petitioner’s failure to comply with the regulation’s requirements.

**I. Background**

Petitioner, evidently, is a skilled nursing facility which participates in the Medicare program. Its participation in Medicare is governed by sections 1819 and 1866 of the Social Security Act (Act) and by regulations at 42 C.F.R. Parts 483 and 488. Its right to a hearing in this case is defined in regulations at 42 C.F.R. Part 498.

On May 19, 2008 Petitioner filed a hearing request challenging “findings” contained in an attachment consisting of a May 13, 2008 letter to Petitioner from the Louisiana Department of Health and Hospitals. That letter, in turn, constitutes a notice by a Louisiana State informal dispute resolution (IDR) panel addressing findings of noncompliance that were made at a survey of Petitioner’s facility that was conducted on

February 29, 2008. Petitioner's hearing request does not directly challenge any findings of noncompliance made by The Centers for Medicare & Medicaid Services (CMS) based on the compliance survey findings. Nor does the hearing request challenge – or even mention – remedy determinations made by CMS.

On October 2, 2008 CMS filed a motion for summary judgment. The gravamen of CMS's motion is that Petitioner's hearing request fails in any meaningful respect to comply with the specificity requirements for hearing requests stated at 42 C.F.R. § 498.40(b). On October 30, 2008, Petitioner, evidently in response to the motion, filed a document entitled "Revised Appeal Notice". Additionally, on October 31, 2008, it filed a brief opposing CMS's motion.

## **II. Issues, findings of fact and conclusions of law**

### **A. Issue**

The issues in this case are whether Petitioner:

1. Complied with the requirements of 42 C.F.R. § 498.40(b) so as to protect its right to a hearing; and
2. Made a showing of good cause for not timely filing an acceptable hearing request.

### **B. Findings of fact and conclusions of law**

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.

#### ***1. Petitioner failed to comply with the specificity requirements stated at 42 C.F.R. § 498.40(b).***

The regulation governing the contents of a hearing request in a case in which a party challenges a determination made by CMS is explicit:

The request for hearing must –

- (1) Identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and

(2) Specify the basis for contending that the findings and conclusions are incorrect.

42 C.F.R. § 498.40(b)(1), (2).

By any measure Petitioner failed utterly to comply with these requirements. Indeed, the “Revised Appeal Notice” that Petitioner filed after CMS filed its motion for summary judgment is just as deficient as is Petitioner’s May 19, 2008 request.

Neither CMS nor Petitioner has provided me with a copy of CMS’s initial notice letter to Petitioner nor with a copy of the survey report on which that notice was based. But, it is apparent that CMS made a determination to impose civil money penalties, and possibly other remedies, against Petitioner based on adverse survey findings. It is apparent also that the survey findings on which CMS based its remedy determinations included specific findings of noncompliance, some of which were at the immediate jeopardy level of scope and severity.<sup>1</sup>

Neither Petitioner’s hearing request nor its revised notice of appeal provides CMS or me with anything from which CMS or I might determine what is at issue in this case. There is nothing in either Petitioner’s initial hearing request or in its revised appeal notice which identifies which issues Petitioner challenges, let alone the specific findings of fact and conclusions of law which Petitioner contests. In neither document has Petitioner identified so much as a single specific fact finding with which it disagrees. Nor has Petitioner articulated any arguments that CMS’s determinations of noncompliance are wrong as a matter of law. No reasonable person could determine from either of these two documents what Petitioner’s arguments and defenses are. Nor has Petitioner challenged the remedies that CMS imposed. The May 19 hearing request is completely silent as to that issue. The revised notice of appeal contains a boilerplate statement that Petitioner “further contests the reasonableness and appropriateness of the civil monetary penalty imposed” against it. But, Petitioner provides not a word of explanation as to why the civil money penalties imposed by CMS might be unreasonable.

In opposing CMS’s motion Petitioner argues that its hearing request was adequate because, in attaching the May 13, 2008 letter from the IDR panel to its hearing request, Petitioner provided CMS with adequate notice of the deficiencies that it was challenging. But, Petitioner’s simply reciting that it intended to challenge certain findings of

---

<sup>1</sup> The term “immediate jeopardy” is defined at 42 C.F.R. § 488.301 to include noncompliance by a facility which causes, or which has a likelihood of causing, serious injury, harm, impairment, or death to one or more residents of the facility.

noncompliance is unacceptable. The regulation's requirements are explicit. A party filing a hearing request *must*, at a minimum, set forth those fact findings and conclusions of law which it intends to challenge and explain *why* it is challenging them. There is absolutely nothing in either Petitioner's initial hearing request or in its amended appeal notice which identifies the fact findings or conclusions that Petitioner is challenging and, also, the request and amended appeal notice are absolutely silent as to why Petitioner believes CMS's determinations to be wrong.

***2. I may dismiss a hearing request which fails to comply with the regulation's specificity requirements.***

A hearing request that is so inadequate as are the documents filed on behalf of Petitioner is not a hearing request within the meaning of 42 C.F.R. § 498.40(b)(1) and (2). Failure by a facility to file a hearing request timely, absent a showing of good cause for an untimely filing, is grounds for dismissal pursuant to 42 C.F.R. § 498.70(c). I have authority to dismiss Petitioner's hearing request because the time period within which it was entitled to file a hearing request has long since elapsed and because Petitioner has yet to file anything which comprises a "hearing request" within the meaning of regulatory requirements.

***3. Petitioner has not made a showing of good cause for its failure to file a hearing request in compliance with regulatory requirements.***

Petitioner has not denied that it was given notice by CMS of CMS's intent to impose remedies against it nor has Petitioner asserted that it was unaware of the regulatory requirements governing hearing requests. Petitioner is represented by counsel who is either aware of, or should be aware of, the specificity requirements of 42 C.F.R. § 498.40(b). Moreover, CMS's motion for summary judgment explicitly put counsel on notice of the deficiencies in Petitioner's hearing request.

Notwithstanding, Petitioner has done nothing to satisfy the regulation's specificity requirements. It continues to fail to offer even the least explanation of its reasons for demanding a hearing.

Petitioner has offered no explanation for its obstinacy in the face of the regulation's requirements for specificity. It has not contended that it does not understand the regulation or that some events beyond its capacity to control prevent it from filing an acceptable hearing request.

Petitioner argues that CMS, if it was truly concerned about the inadequacy of Petitioner's hearing request, should have corresponded with Petitioner's counsel asking for clarification of Petitioner's basis for requesting a hearing. But, that is not CMS's obligation. The burden is squarely on Petitioner to explain why it seeks a hearing. Petitioner failed to do so even after CMS put Petitioner on notice that it sought to dismiss the hearing request on grounds of inadequacy.

To order Petitioner now to file an acceptable request might be an exercise in futility given Petitioner's refusal thus far to file one. Furthermore, CMS would be prejudiced if I did so. Months have already transpired since CMS determined to impose remedies against Petitioner for noncompliance with nursing home participation requirements. Remedies lose their purpose and may even become meaningless if the delay between the determination to impose them and their actual imposition becomes protracted. Giving Petitioner a third bite at the apple at this juncture of the case certainly would protract the process to CMS's detriment. I find no justification for doing so in view of Petitioner's persistent failure to comply with requirements governing hearing requests.

***4. Dismissal of Petitioner's hearing request is appropriate given Petitioner's failure to file an acceptable request and the absence of any good cause for its failure to do so.***

I dismiss Petitioner's hearing request.<sup>2</sup> There is no reason why I should give Petitioner another chance to file an acceptable hearing request given its persistent failure to comply with the requirements of 42 C.F.R. § 498.40(b).

\_\_\_\_\_  
/s/  
Steven T. Kessel  
Administrative Law Judge

---

<sup>2</sup> CMS characterized its motion as a motion for summary judgment although it asked for dismissal as an alternative remedy. I do not impose summary judgment here because I make no finding as to whether there are disputed issues of material fact in this case. Indeed, I have no idea what the fact issues are, given Petitioner's failure to file an acceptable hearing request.