Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Shadow Creek Medical Clinic,
(CLIA ID: 45D2050056),
Docket No. C-17-40

and

Fairway Medical Clinic,
(CLIA ID: 45D1087988)
Docket No. C-17-41

Petitioners,

v.

Centers for Medicare & Medicaid Services.

ALJ Ruling No. 2017-5

Date: December 20, 2016

RULING DISMISSING REQUESTS FOR HEARINGS

I dismiss the hearing requests of Petitioners Shadow Creek Medical Clinic (Shadow Creek) and Fairway Medical Clinic (Fairway).[1] I do so because both Petitioners filed untimely hearing requests and they have not demonstrated good cause for me to extend their respective deadlines for filing a hearing request.

[1] Petitioners filed separate hearing requests and their requests were docketed as C-17-40 (Shadow Creek) and C-17-41 (Fairway). I did not consolidate the hearing requests into a single docket number. However, I am issuing a consolidated ruling in these cases inasmuch as both Petitioners have the same owner, Murtaza Mussagi, D.O., and also because these cases involve very similar facts, identical legal issues, and identical arguments by the parties.

I. Background

Each of these cases involves a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke the Petitioner's laboratory certificate pursuant to the Clinical Laboratory Improvements Amendments (CLIA). Each Petitioner filed a hearing request challenging CMS's determination. CMS moved to dismiss each case on the ground that Petitioner in each case filed an untimely hearing request. Each Petitioner opposed CMS's motion.

In Shadow Creek, CMS filed exhibits that it identified as CMS Ex. 1-CMS Ex. 10. In that case, Petitioner filed exhibits that it identified as P. Ex. 1-P. Ex. 5. It also filed two unidentified declarations by Dr. Mussagi, the first dated October 12, 2016, and the second dated December 5, 2016. In Fairway, CMS filed exhibits that it identified as CMS Ex. 1-CMS Ex. 7. Petitioner filed exhibits that it identified as P. Ex. 1-P. Ex. 5, plus two unidentified declarations by Dr. Mussagi dated October 12, 2016, and December 5, 2016. Subsequently, by letter dated December 6, 2016, Petitioner requested that I disregard P. Exs. 1-5 in Fairway because those exhibits were erroneously filed.

I receive all of CMS's proposed exhibits into the record. Additionally, I receive P. Ex. 1-P. Ex. 5 in Shadow Creek and Dr. Mussagi's declarations in Fairway and Shadow Creek. In Shadow Creek, I identify Dr. Mussagi's first declaration as P. Ex. 6 and his second declaration as P. Ex. 7. In Fairway, I identify Dr. Mussagi's first declaration as P. Ex. 1 and his second declaration as P. Ex. 2. In order to avoid confusion, to the extent that I refer to a party's exhibits in this ruling, I do so with the case docket number as a prefix, i.e. 17-40, P. Ex..

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether Petitioners filed untimely hearing requests and whether either Petitioner established good cause for its untimely filing.

B. Findings of Fact and Conclusions of Law

Administrative hearings in cases involving challenges to determinations to impose sanctions pursuant to CLIA, including revocation of a CLIA certificate, are governed by regulations at 42 C.F.R. Part 498. These regulations allow a party affected by an adverse determination 60 days within which to file a request for hearing. 42 C.F.R. § 498.40(a)(2). A party loses its right to a hearing if it does not file its request timely and

an administrative law judge does not find good cause for the party's late filing. *See* 42 C.F.R. § 498.40(c). An administrative law judge may dismiss a hearing request that is untimely, absent a showing of good cause for the untimely filing. 42 C.F.R. § 498.70(c).

The critical facts in these two cases are, for the most part, undisputed. In each case, CMS sent notices to Petitioner by fax of its intent to impose sanctions. In neither case did Petitioner file a request for a hearing within 60 days of its receiving notice of CMS's intent to revoke its CLIA certificate. Petitioner Shadow Creek filed a hearing request more than a year after receiving notice from CMS of its intent to revoke. Petitioner Fairway filed a hearing request more than six months after receiving notice from CMS of its intent to revoke.

The parties dispute the legal significance of the *manner* in which CMS notified Petitioners of its determinations. In these cases, CMS faxed its notices of adverse determinations to Petitioners. Petitioners assert that this method of notification is not permissible, contending that the only valid form of notification would have been by United States mail. Therefore, Petitioners claim CMS's notifications are without legal significance and did not establish deadlines for Petitioners to request hearings.

Petitioners argue also that in each case, they did not receive one of CMS's notifications and that this notification was critical to establishing each Petitioner's right to a hearing and a deadline for requesting a hearing. Petitioner Shadow Creek asserts that it never received CMS's notice of its findings of immediate jeopardy condition level noncompliance with CLIA, a notice stating CMS's intent to impose intermediate sanctions and apprising Petitioner Shadow Creek of its hearing rights. 17-40 P. Ex. 7; *see* 17-40 CMS Ex. 5. Petitioner Fairway makes the same assertion concerning the notice CMS sent to it in that case. 17-41 P. Ex. 2; *see* 17-41 CMS Ex. 2.

CMS asserts that it has proof that Petitioners Shadow Creek and Fairway actually received the two faxes in question. 17-40 CMS Ex. 5; 17-41 CMS Ex. 3. I find CMS's evidence to be persuasive, consisting of a record of fax transmissions showing that the two faxes in question actually were received. However, I find it unnecessary to resolve the dispute between the Petitioner in each case and CMS as to whether the Petitioner received the fax in question. In each case, Petitioner knew that CMS had imposed the final sanction against it of revocation of its CLIA certificate. In each case, CMS mailed a copy of the allegedly non-received fax to the Petitioner after Petitioner asserted that it hadn't received it.

But, in neither case did that knowledge prompt Petitioner to request a hearing. Neither Petitioner requested a hearing for months, notwithstanding its knowledge that CMS had imposed sanctions against it including revocation of its CLIA certificate. 17-40 CMS Ex. 6; CMS Ex. 7; 17-41 CMS Ex. 5; CMS Ex. 6.

I find to be unpersuasive Petitioners' assertions that CMS's notices are invalid because they were not sent to Petitioners by United States mail. Petitioners rest their argument on the language of 42 C.F.R. § 498.20(a), which provides that CMS "mails" notice of its initial determination to an affected party. Petitioners argue that CMS contravened the plain meaning of the regulation and that, therefore, its notices are invalid. Petitioners' arguments exalt form over substance. The issue here is not whether CMS jumped through all of the regulatory hoops in order to provide Petitioners with notice. Rather, the issue is whether Petitioners *actually had notice* of CMS's determinations. Clearly, they did. The knowledge that Petitioners obtained should have motivated them to act. They failed to do so and so, forfeited their hearing rights.

I note also that 42 C.F.R. § 498.20(a) does not limit CMS to providing notice by United States mail. The term "mail" does not suggest that the only form of "mail" is United States mail, especially when read in the context of all of the forms of reliable electronic communications that are now available to CMS and to private parties. For example, one could easily find that e-mail is a form of "mail" perfectly consistent with the regulation's plain meaning. I do not find that anything in the regulation's language precludes faxing documents in lieu of dropping them into a mail slot.

Neither Petitioner established good cause for filing late. The term "good cause" is not defined by regulation, but it has been interpreted universally to mean a circumstance beyond a party's ability to control that prevents it from filing a timely hearing request. In these cases, there is nothing to suggest that either Petitioner was prevented from filing timely by circumstances that were beyond its ability to control. Indeed, what neither Petitioner explains is why it waited so long – months beyond the 60-day deadline in each case – to file a hearing request. Neither Petitioner offered a credible explanation for its procrastination.

_____/s/_____
Steven T. Kessel
Administrative Law Judge