Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Orchard Park Health Care Center,
(CCN: 065259),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-13-1163

ALJ Ruling No. 2015-8

Date: February 3, 2015

DISMISSAL

For the reasons set forth below, I dismiss as untimely the hearing request filed by Petitioner, Orchard Park Health Care Center.

Background

The following facts are not in dispute:

Petitioner is a skilled nursing facility located in Littleton, Colorado, that participates in the Medicare program. The Colorado Department of Public Health and Environment (state agency) surveyed the facility on April 9, 2013. Based on the survey findings, the Centers for Medicare & Medicaid Services (CMS) determined that the facility was not in substantial compliance with Medicare requirements. CMS Ex. 1. In a notice letter dated May 16, 2013, CMS advised Petitioner that the facility was not in substantial compliance and that CMS was therefore imposing remedies: a $3,000 per instance civil money penalty and a denial of payment for new admissions. CMS Ex. 1.[1]

[1] CMS subsequently determined that the facility achieved substantial compliance as of May 20, 2013. CMS Ex. 3.

A section of the notice letter – prominently captioned "**Appeal Rights**" – advised the facility of its right to request a hearing before an administrative law judge (ALJ) "[i]f you disagree with the finding of noncompliance [that] resulted in the imposition of the CMP. . . ." The letter then cites the regulations that govern such appeals – 42 C.F.R. § 498.40 *et seq*. The letter emphasized that a "***written request*** for a hearing must be filed within **sixty (60) days from the date of receipt of this letter**." (emphasis in the original). CMS Ex. 1 at 3. The letter told the facility where to send its hearing request and explained that such a request should identify the specific issues and findings of fact and conclusions of law with which the facility disagrees and should specify the bases for contending that CMS's findings and conclusions are incorrect. CMS Ex. 1 at 3.

CMS sent the notice letter by facsimile (fax) and by certified mail, and CMS submits a copy of the fax receipt showing that the facility received the letter on May 16, 2013. CMS Ex. 2; *see* CMS Ex. 5 at 1 (Cardenas Decl. ¶ 3); Hearing Request Attachment 1 at 1 (indicating 5/16/13 receipt).

In a letter dated July 29, 2013, received by the Civil Remedies Division on August 7, 2013, Petitioner requested a hearing. CMS now moves to dismiss the request as untimely, which Petitioner opposes. [2]

Discussion

> ***Petitioner is not entitled to a hearing because it did not file a timely hearing request, and no good cause justifies extending the time for filing.*** [3]

Section 1866(h) of the Social Security Act authorizes administrative review of determinations that a provider fails to comply substantially with Medicare program requirements "to the same extent as is provided in section 205(b) of the [Act]." Under section 205(b), the Secretary of Health and Human Services must provide reasonable notice and opportunity for a hearing "upon request by [the affected party] who makes a showing in writing that his or her rights may be prejudiced" by the Secretary's decision. The hearing request "*must* be filed within sixty days" after receipt of the notice of CMS's determination. (emphasis added). Act § 205(b). The 60-day time limit is thus a statutory requirement. *See Cary Health and Rehab. Ctr.*, DAB No. 1771 at 8-9 (2001).

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[2] CMS accompanied its motion and brief with five exhibits (CMS Exs. 1-5). With its response, Petitioner attached one exhibit (P. Ex. 1). CMS filed a reply.

[3] I make this one finding of fact/conclusion of law.

Similarly, the regulations mandate that the affected party "file the request in writing within 60 days from receipt of the notice . . . unless that period is extended . . . ." 42 C.F.R. § 498.40(a)(2). On motion of a party, or his/her own motion, the ALJ may dismiss a hearing request where that request was not timely filed and the time for filing was not extended. 42 C.F.R. § 498.70(c).

No one disputes that the facility received its notice on May 16, which means that its hearing request was due no later than July 15, 2013. Petitioner's July 29 hearing request was therefore untimely and, absent a showing of good cause for my extending the time in which to file, should be dismissed pursuant to 42 C.F.R. § 498.70.

Good cause. Petitioner has offered several explanations for the late filing. In its hearing request, it asserts that, because its request for informal dispute resolution (IDR) was still pending, CMS extended until July 29, 2013, the deadline for filing its hearing request. Hearing Request at 2. During these proceedings, Petitioner expanded on that claim, complaining that CMS's notice letter was "ambiguous at best regarding the deadline to file a hearing request." P. Response at 3.

In fact, the notice was not ambiguous, and the evidence before me establishes that Petitioner well knew when its hearing request was due. CMS had no authority to extend the filing period and its employee did not do so.

When CMS imposes a penalty based on deficiencies cited during a survey, the facility has a number of options. The notice letter lays out those options:

1) The facility can waive its right to a hearing; if it does so, CMS will reduce its CMP by 35%;

2) The facility can challenge the cited deficiencies through the state IDR process (which does not preclude it from waiving its hearing rights and getting the 35% discount or from requesting a hearing);

3) The facility can request a hearing before an ALJ.

As the letter explains, each of these responses is governed by a different set of rules. The notice letter addresses each option in a separately-captioned section.

Petitioner nevertheless complains that the letter gave the facility until July 25 to request a waiver, so the 60-day filing deadline for requesting waiver was, in fact, a 70-day filing deadline. According to Petitioner, the facility legitimately thought that this provision applied to hearing requests as well as waiver requests, so it believed that its deadline for requesting a hearing was July 25 rather than July 15. As the discussion below

establishes, Petitioner thought no such thing and was well aware of the differing deadlines.

The notice letter says, "[i]n accordance with 42 C.F.R. § 488.436, **if you waive the right to a hearing, in writing, within sixty (60) days from the date of receipt of this notice, the amount of the CMP will be reduced by thirty-five percent (35%)**." (emphasis in original). The letter then tells the facility where to send the waiver request (to CMS in Denver) and warns that it must be *received* by July 25, 2013. CMS Ex. 1 at 2. This section of the letter discusses the waiver request only; the instructions for requesting ALJ review are in a completely different section and do not afford the facility a 10-day "grace period," which presumably factors in time for mailing.[4]

As CMS points out, even if the facility legitimately thought that July 25 was the deadline for requesting an ALJ hearing (which it did not), it did not even meet that deadline.

Petitioner, however, claims that a CMS employee extended the time for filing. In fact, the employee did not extend the time for filing a hearing request (which she had no authority to do); as the facility well understood, she extended the time for requesting waiver. Hearing Request Attachment 2 (e-mail confirming that the facility's *waiver appeal date* was extended until COB July 29); CMS Ex. 5 (Cardenas Decl. ¶¶ 4, 5).

Petitioner suggests that the CMS employee was authorized to extend the date for filing its hearing request, pointing to the purported "absence of any regulation or case law that would not authorize her actions." P. Response at 5. Putting aside the glaring fallacy underlying this argument (that an individual is presumed authorized to speak for an agency unless established otherwise), it is simply wrong. The regulations that govern these proceedings – which are cited in the notice letter – specifically direct the affected party to file its request for extension *with the ALJ* and provide that the ALJ has the authority to extend the time for filing. 42 C.F.R. § 498.40(c); *see Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63 (1984) (holding that those who participate in the Medicare program are supposed to understand program rules).

Moreover, Petitioner's claim that it misunderstood the filing deadline is particularly disingenuous because its own submissions establish that the claim simply is not true. The facility well understood the distinctions among the three options and the differences in

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[4] Neither the statute nor the regulations specify whether the date of "filing" means the date of mailing or the date of receipt. By requiring that the waiver request be received by a specific date more than 60 days out, CMS seems to have resolved the issue by factoring in a generous allotment of time for mail delivery. The Civil Remedies Division, on the other hand, has resolved the issue by considering the date of mailing to be the date of filing.

the deadlines. Petitioner's counsel carefully and accurately laid these out in a series of emails to facility management.[5] The facility apparently requested IDR and wanted to wait until the results of that review were in before it decided whether to appeal. In an e-mail memorandum, dated July 11, 2013, counsel explained:

> *Your deadline* to file a federal appeal of the CMPs imposed for the F323 and F333 tags on the April 9, 2013 survey *is 7/15/13* . . . . If no [IDR] decision yet, then you have some decisions to make to reserve your right to continue to challenge these two tags.

Hearing Request Attachment 1 at 6 (emphasis added).[6] Counsel recommended that the facility call the state agency to find out if the IDR decision had been made, emphasizing *the July 15 appeal deadline*. If the facility did not receive the IDR decision, the memo advised, it had two choices: 1) file an appeal, which it could withdraw if it received a favorable IDR decision; or 2) file the waiver no later than 7/22/13 "so that it is received by CMS in their office before 7/25/13 and request the 35% discount." *Id*.

In light of these explicit instructions, I find not credible the facility administrator's declaration that he thought that CMS had extended the deadline for requesting an ALJ hearing. *See* P. Ex. 1. Moreover, even if I accepted his claim that he misunderstood the deadline, I find such a "misunderstanding" wholly unreasonable.

Thus, even if I accepted the possibility that a reasonable person could have been misled by CMS's notice letter (which I do not), I could not find good cause for Petitioner's late filing in this case because the facility was not misled. It well understood the appeal deadline and has shown no good cause for missing it.

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[5] Petitioner itself submitted this correspondence and has thus waived any claim of privilege.

[6] The attachment's pages are not numbered. Attachment 1 includes CMS's four-page notice letter followed by three pages of the e-mail correspondence.

Conclusion

Because Petitioner did not file its hearing request within sixty days of receiving the May 16, 2013 notice letter, and no good cause justifies my extending the time for filing, I dismiss its request pursuant to 42 C.F.R. § 498.70(c).

/s/
Carolyn Cozad Hughes
Administrative Law Judge