

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Appellate Division

_____)	
In the Case of:)	DATE: June 5, 2002
Mimiya Hospital,)	
Petitioner,)	Civil Remedies CR836
- v. -)	App. Div. Docket No. A-02-22
Centers for Medicare &)	Decision No. 1833
Medicaid Services.)	
_____)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Mimiya Hospital (Mimiya) appealed a November 6, 2001 decision by Administrative Law Judge (ALJ) Jose A. Anglada dismissing a request by Mimiya for a hearing on the determination by the Centers for Medicare & Medicaid Services (CMS) to impose various remedies on Mimiya. See Mimiya Hospital, DAB CR836 (2001) (ALJ Decision). CMS imposed a total civil money penalty (CMP) of \$72,900 on Mimiya, consisting of a CMP of \$67,100 for noncompliance with Medicare requirements at a level of immediate jeopardy to Mimiya's residents and a CMP of \$5,800 for the same underlying deficiency but with the immediate jeopardy removed. The ALJ determined that Mimiya failed to file its hearing request to appeal the CMP within the 60-day period provided in the applicable appeal procedures set forth in 42 C.F.R. Part 498.

For the reasons discussed below, we find that the ALJ correctly found that a May 26, 2000 notice to Mimiya fully apprised Mimiya of the existence of two instances of noncompliance with Medicare requirements. We further find that the failure of CMS to inform Mimiya of its regulatory right to settle for 65 percent of the proposed penalty if Mimiya waived its right to request a hearing did not render the notice invalid. Further, while we affirm the ALJ's finding that the violation for which a \$100 per day CMP was

imposed was not timely challenged, we remand this case to the ALJ to allow Mimiya to challenge the compliance determination date.

The record here includes the record before the ALJ and the parties' submissions on appeal. In reviewing an ALJ decision, our standard of review on a disputed issue of law is whether the initial decision is erroneous; for a disputed issue of fact, the standard is whether the ALJ decision is supported by substantial evidence in the record. The standard of appellate review of a dismissal of a request for hearing where dismissal is committed by regulation to the discretion of the ALJ is whether the ALJ has abused his or her discretion. Cf. Rulings on Request for Removal of Hearing to Board, Rehabilitation & Healthcare Center of Tampa, Appellate Division Docket No. A-99-95 (August 16, 1999); Four States Care Center, Appellate Division Docket No. A-99-66, (June 7, 1999) (regulation specifying that an ALJ "may" dismiss means ALJ has discretion to determine whether dismissal is appropriate based on the circumstances of the case).¹

Applicable Regulations

Procedures for requesting a hearing to appeal CMS's imposition of remedies are set forth at Subpart D of 42 C.F.R. Part 498. As pertinent to this case, these regulations require that -

The affected party or its legal representative or other authorized official must file the request in writing within 60 days from receipt of the notice of initial, reconsidered, or revised determination unless that period is extended in accordance with paragraph (c) of this section.

42 C.F.R. § 498.40(a)(2).

Regulations regarding CMS's notice of a CMP state that, among other things, the notice "includes" the following -

Instructions for responding to the notice, including a statement of the facility's right to a hearing, and the implication of waiving a hearing, as provided in § 488.436.

42 C.F.R. § 488.434(a)(2)(viii). Section 488.436 provides:

¹ The two cited rulings have been published as attachments to Lakewood Plaza Nursing Center, DAB No. 1767 (2001).

(a) *Waiver of a hearing.* The facility may waive the right to a hearing, in writing, within 60 days from the date of the notice imposing the civil money penalty.

(b) *Reduction of penalty amount.* (1) If the facility waives its right to a hearing in accordance with procedures specified in paragraph (a) of this section, CMS or the State reduces the civil money penalty by 35 percent.

(2) If the facility does not waive its right to a hearing in accordance with the procedures specified in paragraph (a) of this section, the civil money penalty is not reduced by 35 percent.

Factual Background

The following background information is drawn from the ALJ Decision and the record before him. Mimiya is a skilled nursing facility in Santurce, Puerto Rico. On April 4 - 6, 2000, the Puerto Rico Department of Health (PRDOH) conducted a compliance survey of Mimiya, which found Mimiya not in substantial compliance with several Medicare participation requirements. By letter dated May 26, 2000, CMS informed Mimiya that it was imposing the following remedies: a CMP of \$3,050 per day, effective April 4, 2000 through April 25, 2000, a 22-day period of noncompliance which constituted immediate jeopardy to resident health and safety; a CMP of \$100 per day, effective April 26, 2000, which would continue until Mimiya achieved substantial compliance; and a denial of payment for new admissions, effective May 28, 2000. CMS Ex. 1, at 3. This notice also informed Mimiya:

If you disagree with this determination, you or your legal representative may request a hearing before an administrative law judge of the Department of Health and Human Services, Departmental Appeals Board. Procedures governing this process are set out in 498.40, et seq.

A written request for a hearing must be filed no later than 60 days from the date of receipt of this letter.

Id. The letter did not contain any language as provided at 42 C.F.R. § 488.436.

By letter dated August 30, 2000, CMS informed Mimiya that a revisit by the PRDOH on June 23, 2000, had found the facility in substantial compliance with program requirements. CMS Ex. 2. CMS stated in the letter that the previously imposed CMP of \$100 per day was terminated at the amount of \$5,800 for the 58-day

period of noncompliance (April 26 through June 22). Id. With the previously imposed CMP of \$3,050 per day for immediate jeopardy for 22 days, the total CMP imposed on Mimiya was \$72,900. Id. at 2. This letter further stated:

If you would like to waive your right to a hearing, you must do so in writing within 60 calendar days from the date of this notice. If you waive your right to a hearing in accordance with the requirements specified at 42 Code of Federal Regulations 488.436, the amount of CMP will be reduced by 35%.

If a hearing is requested, the CMP will not be collected until a final administrative decision upholding the imposition of the remedy has been made.

Id. at 2. On October 22, 2000, Mimiya filed a request for a hearing.

The ALJ Decision

In his decision, the ALJ made three numbered findings of fact and conclusions of law (FFCLs).

1. Petitioner failed to timely file a hearing request in response to CMS's May 26, 2000 notice. CMS's May 26, 2000 notice to Petitioner unambiguously informed Petitioner of CMS's initial determination to impose a remedy and of Petitioner's right to request a hearing to challenge that determination.
2. Petitioner did not file a written request for an extension of time to file a hearing request.
3. The August 30, 2000 CMS notice did not contain any initial determinations for which a hearing may be requested.

In making these FFCLs, the ALJ stated that both the Social Security Act (Act) and the regulations are explicit in requiring that a request for a hearing must be filed within 60 days of receipt of the notice of an imposition of a remedy.² The ALJ

² The ALJ cited section 205(b) of the Act. The right to a hearing on these CMPs, however, arises from section 1819(b)(2)(B)(i), which incorporates parts of section 1128A of the Act.

found that Mimiya's request for a hearing was filed more than 82 days after the date it was due. In addressing Mimiya's argument that CMS's May 26, 2000 notice failed to inform Mimiya that it had the option to waive a hearing and receive a 35 percent reduction in the CMP and thus should be considered null and void, the ALJ found that Mimiya was clearly on notice that deficiencies had been found and sanctions were being imposed and that it had a right to request a hearing within 60 days. The ALJ found that Mimiya's "defective notice argument is a matter that I do not have jurisdiction to decide once I have made the threshold finding that the hearing request is untimely."³ ALJ Decision at 4. The ALJ further found that CMS's August 30, 2000 notice did not contain any initial determinations for which a hearing could be requested, since there were no new findings of deficiencies or new sanctions imposed to which hearing rights would attach.

On appeal, Mimiya argued that CMS's May 26, 2000 notice should be considered null and void because CMS, by denying Mimiya the right to opt for the waiver of a hearing with the consequent 35 percent reduction in the CMP, violated Mimiya's rights to due process and equal protection. Mimiya maintained that the ALJ erred in his FFCL 1 by not addressing Mimiya's due process argument, with the other two FFCLs hinging on the ALJ's finding that the May 26, 2000 notice adequately informed Mimiya of its rights. Mimiya contended that the operative date for triggering the 60-day period to file a hearing request was CMS's notice of August 30, 2000, in which CMS notified Mimiya of both the 60-day deadline for filing a hearing request and the option of waiving a hearing in exchange for a 35 percent reduction in the CMP, and that Mimiya therefore met this deadline with its October 22, 2000 request for a hearing.

Discussion

In considering what deadline Mimiya faced for filing a hearing request in this case, we deem it important to distinguish the remedies imposed by CMS here. In its May 26, 2000 notice, CMS stated it was imposing a \$3,050 per day CMP for the 22-day period Mimiya was in noncompliance at the immediate jeopardy level, and also, after the immediate jeopardy condition was corrected, a \$100 per day CMP for the same underlying deficiency for an indeterminate period until substantial compliance was achieved.

³ The ALJ did, however, state in a footnote to his decision, "In the interest of fairness, CMS should consider whether it should now allow Petitioner to pay the total CMP amount reduced by 35%." ALJ Decision at 4 - 5, n.1.

It was not until the August 30, 2000 notice that CMS finalized the amount and duration of this latter CMP, \$5,800 for 58 days, based on a resurvey by the PRDOH that determined Mimiya was back in compliance as of June 23, 2000.

The ALJ determined that the May 26, 2000 notice triggered the 60-day period for Mimiya to file a hearing request for both CMPs and that the August 30, 2000 notice contained no new initial determinations for which a hearing could be requested.

We agree with the ALJ that Mimiya did not meet the regulatory deadline for filing a hearing request to contest the CMP related to the immediate jeopardy finding. This CMP was for a discrete period that Mimiya was found out of compliance at the immediate jeopardy level. Mimiya was given explicit directions on how to seek review of that determination in CMS's May 26, 2000 notice. Mimiya offered no explanation for its failure to request a hearing on this determination other than that, as the result of the physical and economic damage it had received due to Hurricane Georges, "[p]ayment of the CMP seemed, at that point in time, preferable and probably less expensive than incurring the added cost of retaining outside counsel and embarking, through the hearing request, in the uncertain process of contesting the CMP determinations even though it had valid objections to those determinations." Reply Br. at 4.

Mimiya offered nothing to show how the failure to receive the option to settle the CMP for 65 percent would impact its due process rights; indeed, by failing to request a hearing based on the May 26 notice, it was defaulting for the full imposed penalty amount. If Mimiya did not seek a hearing for the full proposed penalty amount, then informing Mimiya of its option to waive its right to a hearing in exchange for a 35 percent penalty reduction would, if anything, make Mimiya even less likely to seek a hearing. The only "right" Mimiya was deprived of by the failure of CMS to inform it of the 35 percent reduction was the right to settle at the lesser amount. Thus, we hold that Mimiya suffered no prejudice to its right to appeal CMS's initial determination on the merits, and that the only defect in the notice was the failure to notify Mimiya of the option of a 35 percent reduction in exchange for a waiver of hearing rights. This defect is easily cured. We agree that Mimiya is entitled to the opportunity to receive a 35 percent reduction of the CMP attributable to the finding of immediate jeopardy, even though, when offered the reduction in the August 30 notice, Mimiya then ultimately requested a hearing.

Unlike the CMP imposed for the immediate jeopardy deficiency, however, the \$100 per day CMP issued in the May 26, 2000 notice was not for a definite period. Rather, it continued to run until Mimiya was judged to be back in substantial compliance. It was not until Mimiya received the August 30, 2000 letter from CMS that Mimiya was notified of the time period and definitive total amount of the CMP for this deficiency. Without knowledge of the exact amount of the CMP it was facing, Mimiya was not in a position to make a reasonable judgment as to whether the cost of appealing the CMP was worthwhile.

Furthermore, the August 30, 2000 letter was an initial determination that Mimiya had failed to achieve substantial compliance until June 23, 2000. Mimiya should have the opportunity to present evidence that it returned to compliance at an earlier date. For example, if the underlying cause for a deficiency was a problem in a facility's physical plant, as apparently was the case here, the facility could show at a hearing by means of repair invoices that it had remedied the deficiency and returned to substantial compliance at a time earlier than the resurvey. As Mimiya's October 22, 2000 request for a hearing came within 60 days of the August 30, 2000 letter, we find that Mimiya's request for a hearing on the issue of when it achieved substantial compliance was timely.⁴ In so finding, we emphasize that the deficiency finding in the April survey which established the beginning date for the \$100 per day CMP was set out in the May 26, 2000 notice and was not timely appealed by Mimiya; thus only the duration of the period for which the \$100 per day CMP was assessed, and not the underlying violation itself, remains an issue for a hearing.

The regulatory basis for imposing a per day CMP is "the number of days a facility is not in substantial compliance" 42 C.F.R. § 488.430. This determination necessarily includes not only the original finding of noncompliance but also the number of days before substantial compliance is achieved. The May 26 notice could reasonably be viewed as informing Mimiya of the original finding of noncompliance and that it had not yet achieved substantial compliance as of the date of the notice, but it did not inform Mimiya of the total number of days CMS had

⁴ Mimiya's timely request for a hearing means, of course, that it did not waive its hearing rights and is therefore not entitled to a 35 percent reduction in the amount of the CMP for the deficiency for the period beginning April 26, 2000.

determined Mimiya was not in substantial compliance. That did not occur until the August 30 letter.

Our approach here allows CMS to notify a provider at the earliest possible date of an ongoing CMP with potential duration beyond the date of the notice. The early notice of an ongoing CMP serves as an inducement to the provider to come into compliance. The provider nevertheless may appeal the duration of the CMP beyond the date of the original notice once it receives notice of the full duration of the CMP.

We find therefore that the ALJ erred in his FFCL 3 that the August 30, 2000 notice did not contain any initial determinations for which a hearing could be requested, as, in fact, it contained a new (or at the very least, a revised) determination specifying the basis for determining the number of days for which Mimiya was not in substantial compliance. Mimiya should have the opportunity to establish that it came back into substantial compliance at a date earlier than June 23, 2000.

Conclusion

For the reasons discussed above, we find that Mimiya failed to file a timely hearing request with respect to the \$67,100 CMP based on the immediate jeopardy deficiency. We further find that Mimiya timely requested a hearing with respect to duration of the \$100 per day CMP. Accordingly, we remand the CMS determination imposing the latter CMP to the ALJ for a hearing. In doing so, we amend FFCL 3 to read as follows:

3. The August 30, 2000 CMS notice contained an initial determination as to when Mimiya returned to substantial compliance for which a hearing may be requested.

Additionally, we adopt the following FFCL:

4. Mimiya is entitled to the opportunity to receive a 35 percent reduction of the CMP attributable to the finding of immediate jeopardy.

_____/s/_____
Judith A. Ballard

_____/s/_____
Donald F. Garrett

_____/s/_____
Marc R. Hillson
Presiding Board Member