Department of Health and Human Services

# DEPARTMENTAL APPEALS BOARD

## Appellate Division

| In the Case of: | DATE: June 21, 2010 |
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| Waterfront Terrace, Inc., | |
| Petitioner, | Civil Remedies CR2076<br>App. Div. Docket No. A-10-52 |
| | Decision No. 2320 |
| - v. - | |
| Centers for Medicare & Medicaid Services. | |

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Waterfront Terrace, Inc. (Waterfront), a skilled nursing facility located in Chicago, Illinois, appeals the February 24, 2010 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes. Waterfront Terrace, DAB CR2076 (2010) (ALJ Decision). The ALJ dismissed Waterfront's September 14, 2009 hearing request as untimely and concluded that there was no good cause to justify extending the time for filing. For the reasons discussed below, we affirm the ALJ Decision.

Legal Background

The Social Security Act (Act) and federal regulations provide for state agencies to survey a Medicare skilled nursing facility (SNF) or a Medicaid nursing facility (NF) to evaluate compliance with the Medicare and Medicaid participation requirements. Sections 1819 and 1919 of the Act; 42 C.F.R. Parts 483, 488, and

498.[1] A "deficiency" is defined as a "failure to meet a participation requirement specified in the Act or [42 C.F.R. Part 483]." 42 C.F.R. § 488.301. Section 488.301 defines "substantial compliance" as "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." "Noncompliance means any deficiency that causes a facility to not be in substantial compliance." Id.

The Act and regulations also provide for the imposition of remedies on a facility found to be not in substantial compliance. Sections 1819 and 1919 of the Act; 42 C.F.R. Parts 483, 488, and 498. Under sections 1819(h)(2)(D) and 1919(h)(2)(C) of the Act and 42 C.F.R. § 488.417(b), CMS must impose a denial of payment for all new admissions (DPNA) on a facility when the facility is not in substantial compliance within three months after the date it is found to be out of substantial compliance.

Sections 1866(h)(1) and 1866(b)(2) of the Act and the regulations at 42 C.F.R. Parts 488 and 498 set forth appeal rights and procedures for certain types of determinations involving provider participation. Under sections 488.406(a) and 498.3(b)(13), a SNF or NF may appeal a finding of noncompliance that results in the imposition of specified remedies, including a DPNA. Under section 488.402(f), CMS or the state survey agency (as authorized by CMS) gives the facility notice of the determination of noncompliance, the remedy imposed, the effective date of the remedy, and the facility's right to appeal the determination leading to the remedy. Section 498.40(a)(2) states that a request for hearing must be filed "within 60 days from receipt of the notice" of the determination "unless that period is extended in accordance with paragraph (c) of this section." Section 498.40(c), in turn, provides that the ALJ "may extend the time for filing" the hearing request for "good

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[1] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

cause shown." An ALJ may dismiss a hearing request where the party requesting the hearing "did not file a hearing request timely and the time for filing has not been extended." 42 C.F.R. § 498.70(c).

Case Background

The following background information is drawn from the ALJ Decision and the record before the ALJ and summarized here for the convenience of the reader, but should not be treated as new findings.

On January 29, 2009, the Illinois Department of Public Health (state agency) completed health, complaint investigation, and life safety code (LSC) surveys of Waterfront. CMS Exs. 1, 2. In notices dated February 3, 2009 and February 6, 2009, the state agency advised Waterfront that the surveys found the facility to be not in substantial compliance with the program participation requirements. Id.

By letter dated April 15, 2009 and referencing the deficiencies cited in the LSC survey, the state agency notified Waterfront that CMS was imposing a DPNA on the facility. CMS Ex. 3. The April 15 letter also advised Waterfront that the state agency was recommending that CMS impose termination of the facility's provider agreement effective July 29, 2009 if Waterfront did not achieve substantial compliance before that time. Id. The April 15 letter further stated:

**Formal Appeal Rights**

> The facility has the right to contest determinations of non-compliance with Medicare regulations that result in imposed remedies. If the facility requests a hearing, it will be conducted in accordance with 42 CFR, Section 498.40 et seq. In order to be granted a hearing for the Category 1 or 2 remedies imposed in this notice, the facility must file a written request for a hearing within 60 days from the receipt of this notice. . . .

Id. at 2 (emphasis in original). Waterfront received the April 15, 2009 letter on April 20, 2009. CMS Ex. 4.

By letter dated July 14, 2009, CMS advised Waterfront that the facility continued to be not in substantial compliance. CMS Ex.

5. The July 14 letter cited the deficiencies identified during the January 29, 2009 surveys, as well as surveys conducted on March 5, 2009 (complaint investigation and revisit), July 2, 2009 (complaint investigation), and July 8, 2009 (LSC revisit survey). Id. The July 14 letter stated that CMS was imposing a mandatory termination of the facility's Medicare and Medicaid provider agreements effective July 29, 2009. Id.

The July 14 letter also stated that the state agency's April 15, 2009 letter had notified Waterfront of the mandatory DPNA "imposed effective April 29, 2009 due to [Waterfront's] failure to achieve compliance within the required three months." Id. at 3. In addition, the July 14 letter stated that the earlier April 15 letter had notified Waterfront of its "right to appeal the noncompliance that resulted in the imposition of the [DPNA] effective April 29, 2009." Id. at 4. "As of this date [i.e., July 14]," CMS added, "we have not received a request for a hearing." Id.[2]

By letter dated August 6, 2009, CMS advised Waterfront that revisits to the facility on July 4 and July 17, 2009 found that Waterfront returned to substantial compliance effective July 9, 2009. CMS Ex. 6. Consequently, the mandatory DPNA was discontinued effective July 9, 2009, and CMS rescinded the termination of the facility's Medicare and Medicaid provider agreements. Id.

In a request for hearing dated September 14, 2009, Waterfront stated that it had received the July 14, 2009 CMS notice and that it was appealing "any and all remedies currently imposed or proposed by CMS," including the DPNA, as well as the January 29, 2009 survey cycle "determinations by CMS." CMS Ex. 7.

CMS thereafter moved to dismiss Waterfront's hearing request as untimely because the appeal had been filed more than 60 days

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[2] The July 14 letter also stated that, because the DPNA went into effect, Waterfront would be prohibited from offering or conducting a nurse aide training and/or competency evaluation program (NATCEP) for two years, beginning April 29, 2009, pursuant to sections 1819(f)(2)(B) and 1919(f)(2)(B) of the Act. CMS Ex. 5, at 4.

after the facility received the April 15, 2009 notice of imposition of the DPNA.

Waterfront opposed CMS's motion, arguing that the April 15, 2009 notice was defective and therefore did not trigger the 60-day appeal period. Alternatively, Waterfront requested the ALJ to extend the appeal deadline for good cause shown.

The ALJ granted CMS's motion and dismissed Waterfront's hearing request. The ALJ first determined that Waterfront failed to file a hearing request within 60 days after its receipt of the April 15, 2009 notice of noncompliance that notified Waterfront of the imposition of the mandatory DPNA. Next, the ALJ rejected Waterfront's argument that the April 15, 2009 notice was defective. Finally, the ALJ concluded that there was no good cause to justify extending the filing period to September 14, 2009.

Standard of Review

We review a disputed conclusion of law to determine whether it is erroneous. See Departmental Appeals Board, Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs (Board Guidelines), http://www.hhs.gov/dab/divisions/appellate/guidelines/prov.html. We review an ALJ's exercise of discretion to dismiss a hearing request, where such dismissal is authorized by law, for abuse of discretion. See, e.g., High Tech Home Health, Inc., DAB No. 2105, at 7-8 (2007) (and cases cited therein), aff'd, High Tech Home Health, Inc. v. Leavitt, Civ. No. 07-80940 (S.D. Fla. Aug. 15, 2008).

Analysis

Waterfront contends that we should reverse the ALJ Decision based on two grounds. First, Waterfront argues that the ALJ "committed reversible error by failing to rule that the [April 15, 2009] notice [letter] violated due process notice requirements." Waterfront Br. at 2. Alternatively, Waterfront argues, the ALJ "abused her discretion by refusing to extend the time within which Waterfront could file its hearing request to challenge the DPNA sanction." Id. We explain below why we reject each of Waterfront's arguments.

*The ALJ did not err in concluding that the state agency's April 15, 2009 letter reasonably informed Waterfront of its appeal rights.*

On appeal, Waterfront does not deny that it filed its hearing request more than 60 days after it received the state agency's April 15, 2009 notice. Instead, Waterfront contends that the ALJ erred in failing to find that the notice "violated due process notice standards guaranteed by the Fourteenth Amendment." P. Br. at 2. Presenting essentially the same argument it advanced before the ALJ, Waterfront contends that the April 15 letter informed the facility "that it had 60 days to request a hearing to contest 'the Category 1 or 2 remedies' imposed in the Notice," but failed to identify the DPNA as a category 1 or 2 remedy. Id. at 4. Consequently, Waterfront argues, the April 15 letter was so ambiguous that it did not reasonably convey that Waterfront "had 60 days to request a hearing to challenge" the DPNA, as required under due process notice standards. Id. at 2, 4-5 citing cases. Accordingly, Waterfront contends, the "circuitous, bureaucratic legalese" used in the notice failed to satisfy the facility's right to due process. Id. at 5.

Waterfront's argument is without merit. The wording of the April 15, 2009 letter, quoted at length above, unambiguously notified Waterfront that CMS was imposing a single remedy on the facility - a DPNA. CMS Ex. 3. The April 15 letter further informed Waterfront that the state agency had "*recommended* for imposition by CMS" termination of the facility's provider agreement, identified as a category 3 remedy. Id. (emphasis added). The letter specifically instructed Waterfront how to exercise its appeal rights, stating that Waterfront had "the right to contest determinations of non-compliance with Medicare regulations that result in imposed remedies." Id. "In order to be granted a hearing for the Category 1 or 2 remedies *imposed in this notice*," the letter further stated, "the facility must file a written request for a hearing within 60 days from the receipt of this notice." Id. (emphasis added).

We agree with the ALJ that "any reasonable person - even a 'lay person' - receiving this notice would know that the state was imposing a DPNA based on its findings of noncompliance, and that the provider could appeal those findings if it filed a written request within 60 days" of its receipt of the April 15 letter. ALJ Decision at 4. In other words, because the only remedy

imposed in the April 15 letter was the DPNA, and because the letter clearly stated that Waterfront had the right to appeal the remedies that were imposed under the notice, it would not be reasonable to conclude that the DPNA was anything other than an appealable category 1 or 2 remedy. If the DPNA did not constitute such a remedy, the letter's description of the formal appeal rights available to contest the "remedies imposed" under the notice would be meaningless. Moreover, as the ALJ observed, Waterfront "suggests no other possible interpretation, and provides no declaration or other evidence claiming that it had any alternative understanding of the notice." ALJ Decision at 4.

Furthermore, as the ALJ also observed, Waterfront was not in the position of an uninformed layperson, but is "a Medicare-certified provider of services, which should be expected to possess at least a rudimentary understanding of program rules and terminology." Id., n.5, citing Heckler v. Community Health Servs. of Crawford County, 467 U.S. 51, 63 (1984)("those who deal with the government are expected to know the law . . . ."). Like the respondent in Community Health Services of Crawford County, "[a]s a participant in the Medicare program," Waterfront "had a duty to familiarize itself with the legal requirements" of the program. Id. at 64. Those legal requirements include the federal regulations that address Medicare provider survey, certification and enforcement procedures, which explicitly identify DPNAs as category 2 remedies. See 42 C.F.R. § 488.408(d). Accordingly, Waterfront's contention that it could not reasonably have understood the language used in the April 15, 2009 letter as providing the requisite notice of its appeal rights with respect to the DPNA has no merit.

We also reject Waterfront's argument that the ALJ Decision "stands due process on its head by suggesting that if Waterfront was confused by the Notice, then it could have called" the state agency for clarification. Waterfront Br. at 5. According to Waterfront, the ALJ's determination "erroneously shift[ed] the government's burden of satisfying due process by requiring Waterfront to ask the government what the Notice meant." Id. at 5. Waterfront's argument mischaracterizes the ALJ Decision. The ALJ found that the April 15, 2009 letter reasonably informed the facility of its right to appeal the determination that led to the DPNA, as required by section 488.402(f). The ALJ remarked that Waterfront could have contacted the state agency for clarification if it had in fact been "genuinely confused"

about the meaning of the April 15 notice. ALJ Decision at 4. The ALJ observed, however, that Waterfront had presented no evidence to show that when it received the notice it was confused about its meaning. Id. We agree with the ALJ that if Waterfront had reasonably been confused about the meaning of the April letter at that time, then it is also reasonable to expect some evidence or conduct manifesting such confusion.

Accordingly, we conclude that the ALJ did not err in determining that the April 15, 2009 state agency letter was legally sufficient in apprising Waterfront of its appeal rights.

*The ALJ did not abuse her discretion in finding that no good cause existed to justify an extension of time for Waterfront to file its hearing request.*

As noted above, section 498.40(c)(2) of the regulations provides that an ALJ "may extend the time for filing" a hearing request for "good cause shown." Waterfront argues that the ALJ "abused her discretion by refusing to extend the time within which Waterfront could file its hearing request to challenge the DPNA sanction." P. Br. at 2. Waterfront's argument essentially restates its contentions that the April 15, 2009 letter was inadequate to provide the facility sufficient notice of its appeal rights. In essence, Waterfront reframes the argument here to contend that, even if the defect it alleged in the notice did not render the notice void, it should be considered a sufficient ground to justify Waterfront's delay in filing its hearing request.

We rejected above Waterfront's arguments that the April 15, 2009 letter was defective. Moreover, the April 15 letter provided Waterfront with a definitive time frame in which to request a hearing on the noncompliance findings that led to the imposition of the DPNA. Waterfront failed to take advantage of this opportunity either by submitting a timely hearing request or showing good cause for an extension of the time in which to file its appeal. In other words, Waterfront has not provided any explanation why it was unable to file a hearing request prior to the 60-day deadline of June 20, 2009. Thus, Waterfront had no reasonable basis for inaction based on the April 15 letter it received from the state agency.

Accordingly, we find no abuse of discretion in the ALJ's denial of Waterfront's request to extend the time in which to file its hearing request.

Conclusion

For the reasons explained above, we sustain the ALJ's dismissal of Waterfront's September 14, 2009 hearing request as untimely filed and find no abuse of discretion in the ALJ's denial of Waterfront's request to extend the time in which to file its request.

/s/
Judith A. Ballard

/s/
Sheila Ann Hegy

/s/
Stephen M. Godek
Presiding Board Member