Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Parkside Surgery Institute
(CCN: 05C0001455),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-110

Decision No. CR2319

Date: February 9, 2011

DECISION DISMISSING REQUEST FOR HEARING

I dismiss the hearing request of Petitioner, Parkside Surgery Center. Petitioner failed to file a hearing request that conforms to the requirements of 42 C.F.R. § 498.40(b), did not show good cause for its failure, and has not filed its hearing request timely even after being afforded additional time to do so.

I. Background

Petitioner is an ambulatory surgery center that participated in the Medicare program. On September 23, 2010, the Centers for Medicare and Medicaid Services (CMS) sent a notice to Petitioner advising it that its participation in Medicare would be terminated effective November 4, 2010. Petitioner was advised that the termination was being effectuated because surveys of Petitioner's facility completed on May 12 and July 28, 2010 had established that Petitioner had not complied with several enumerated conditions of participation. The notice advised Petitioner of its appeal rights, telling it that it had 60 days from the date of receipt of the notice to file a hearing request. Petitioner was specifically advised that:

> Any such [hearing] request must identify the specific issues as well as the findings of fact and conclusions of law with which you disagree and explain the basis for contending that our findings and conclusions are incorrect . . . .

The notice letter gave Petitioner explicit directions concerning where the hearing request must be mailed.

On November 1, 2010, Robert M. Ross, an attorney then representing Petitioner filed a letter with the San Francisco Regional Office of CMS. The letter purported to enclose a "fully documented response" to the report of the July 28, 2010 survey and requested that the Regional Office advise Mr. Ross whether the response addressed the concerns "set forth in your correspondence and the CMS-2567." Enclosed with the letter was a massive collection of documents consisting of several hundred pages, many of which appear to be facility records. The letter provided no narrative explaining what the documents consisted of, why they were relevant, or how they answered the specific allegations of noncompliance that were stated in CMS's September 23, 2010 letter to Petitioner. Indeed, it is unclear whether Mr. Ross's letter and the enclosed documents were written directly in response to the September 23, 2010 letter.

The San Francisco Regional Office evidently concluded that this letter and submission constituted Petitioner's hearing request and forwarded it to the Departmental Appeals Board, where it was docketed as a hearing request and assigned to me for a hearing and a decision. I reviewed the letter and the attached documents and concluded that it did not constitute a hearing request in compliance with 42 C.F.R. § 498.40(b) because the materials neither identified the issues that were being appealed nor did it explain why CMS's determinations of noncompliance were incorrect.

On November 29, 2010, I had a letter sent to Petitioner's counsel advising him that the submission was not a proper hearing request. I allowed Petitioner until December 15, 2010 to file a hearing request that conformed to regulatory requirements. On December 23, 2010, my office received an e-mail directly from Petitioner requesting that it be resurveyed by CMS. At my direction, the staff attorney advised Petitioner by return email at the email address provided by Petitioner, and with a copy to Petitioner's counsel, that I lacked the authority to order a resurvey. Although the deadline had passed, I reminded Petitioner that a proper hearing request was due December 15, 2010.

I received nothing from Petitioner. On January 5, 2011, I sent an order to Petitioner giving it until January 18, 2011 to show cause why I should not dismiss the case for abandonment. I mailed the order directly to Petitioner as well as to its then-counsel. I told Petitioner in that order that it must file a proper hearing request by the January 18 deadline if it wished to avoid dismissal.

Petitioner did not file a hearing request in response to my order to show cause. Instead, my office received a submission from Petitioner's new counsel. He asserts that Petitioner's former counsel failed to inform Petitioner about all of the deadlines in the case and only informed Petitioner of the order to show cause on January 13, 2011. Petitioner's new counsel asserts that good cause exists for failing to file a hearing request because Petitioner was misled by its previous counsel and was thereby prevented from filing a proper and timely request for hearing. Petitioner's new counsel claims that he has yet to receive Petitioner's entire records and, for that reason, is still unable to file a hearing request.

II. Issue

The issue in this case is whether Petitioner has established good cause for its failure to file a hearing request that conforms to the requirements of 42 C.F.R. § 498.40.

III. Findings of Fact and Conclusions of Law

The regulations governing a hearing in this case are at 42 C.F.R. Part 498. The regulations provide that a party requesting a hearing must do so within 60 days of that party's receipt of a notice of adverse action from CMS. 42 C.F.R. § 498.40(a)(2). An administrative law judge may dismiss any hearing request that is untimely filed where the party requesting the hearing has not shown good cause for its failure to file the request. 42 C.F.R. § 498.70(c). The term "good cause" is not defined in the regulations, but it has been held generally to include circumstances that are beyond a party's ability to control that prevent it from filing a hearing timely.

CMS sent its notice of adverse action to Petitioner on September 23, 2010. Allowing five days for delivery of the notice meant that Petitioner's hearing request was due no later than the end of November 2010. Petitioner failed to file a hearing request. Although its former counsel filed a mass of documents with the CMS San Francisco Regional Office, that submission was not on its face a hearing request nor did it contain any of the information that Petitioner was required to file as part of its hearing request. *See* 42 C.F.R. § 498.40(b). It was for that reason that I directed Petitioner to file a hearing request with me if it wanted a hearing. I also accommodated Petitioner by granting it, on my own motion, a two-week extension to file its request.

Petitioner failed to avail itself of that opportunity. Nor did Petitioner file a hearing request in response to the order to show cause that I sent to it.

I have considered the argument of Petitioner's new counsel that Petitioner was somehow misled by its former counsel into not filing a hearing request. I find this argument to be without merit for three reasons. First, Petitioner has offered no cogent explanation as to what the former counsel said, or failed to say, that would have misled it into believing

that it did not have to file a hearing request by the deadline established by the regulations, or the extended deadline that I granted to it on my own motion. The original notice letter from CMS – which it mailed directly to Petitioner – was unambiguous. It told Petitioner exactly what it must do to preserve its right to a hearing, including telling Petitioner what its hearing request must contain and to whom it must be sent. Petitioner had that information directly, and I do not comprehend how it could have been misled into believing that it was not obligated to follow CMS's instructions if it wanted a hearing.

Second, I find it inconceivable that Petitioner did not know of my order to show cause. I sent that order to Petitioner's former counsel *and* to Petitioner directly. Petitioner had notice directly from me, even if its former counsel failed to bring the order to show cause to Petitioner's attention. The fact that Petitioner failed to act in response to the order to show cause prior to January 13, 2011, when it finally informed its new counsel of the order, is Petitioner's fault and no one else's.

Third, I *still have not received a hearing request* as of this date, now more than three weeks after the deadline that I set in my order to show cause. Petitioner's new counsel offered as an excuse that it had not received documents from Petitioner that he needed to review to file a hearing request. However, weeks have gone by since the due date in the order to show cause, and counsel has still not filed a hearing request. I can conceive of no legitimate excuse for such delay.

Accordingly, I dismiss this matter for cause pursuant to 42 C.F.R. § 498.70(c).

/s/
Steven T. Kessel
Administrative Law Judge