

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Professional Medical Center,)	Date: January 8, 2010
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-594
)	Decision No. CR2052
Centers for Medicare & Medicaid)	
Services.)	
_____)	

DECISION

For the reasons set forth below, I dismiss as untimely the hearing request filed by Petitioner, Professional Medical Center (hereafter Petitioner).

I. Background

Petitioner is a multi-specialty clinic located in Miami, Florida. First Coast Service Options, Inc. (FCSO), a Medicare contractor for the Centers for Medicare and Medicaid Services (CMS), denied Petitioner's enrollment application by letter dated October 15, 2008, pursuant to 42 C.F.R. § 424.530. On December 16, 2008, Petitioner requested reconsideration of FCSO's determination. By letter dated March 4, 2009, FCSO issued its reconsideration decision upholding the denial. Petitioner appealed the unfavorable decision by an undated letter, which was received by the Departmental Appeals Board, Civil Remedies Division, on July 20, 2009.

The case was assigned to me for hearing and decision on July 27, 2009. I held a telephone prehearing conference with the parties on August 27, 2009. With the assistance of the parties I set a briefing schedule to addresses the issues in this case.

Pursuant to the briefing schedule I set, CMS filed a Brief In Support of First Coast Service Options, Inc. Reconsideration Decision with 10 exhibits, CMS Exs 1-10, on September 11, 2009. Petitioner filed a Brief (P. Brief), with seven exhibits, P. Exs. 1-7,

on October 1, 2009. CMS filed a Reply Brief on October 9, 2009. The parties have not objected to my consideration of the offered exhibits. Therefore, I admit CMS Exs. 1-10 and P. Exs. 1-7 into evidence. While I do not decide this case on its merits, I will admit the exhibits submitted by the parties to ensure a complete record in this matter in the event my decision is appealed.

II. Issues, Findings of fact and conclusions of law, and Discussion

A. Issues

- Whether Petitioner filed a timely request for hearing; and if not,
- Whether Petitioner has shown good cause for extending the time to file a request for hearing.

B. Findings of fact and conclusions of law, and Discussion

In its brief, CMS alleges that, as an initial matter, Petitioner's request for hearing is untimely, and therefore, should be dismissed. CMS states that the FCSO's reconsideration decision upholding the denial of Petitioner's enrollment application is dated March 4, 2009, and that Petitioner's request for hearing was received by the Civil Remedies Division on July 20, 2009, more than 120 days from the date of the reconsideration decision. CMS maintains that Petitioner's request for hearing was filed, well beyond the 60-day time limit mandated in the regulations. 42 C.F.R. § 498.40(a)(2). CMS contends that, in accordance with the regulatory presumption, Petitioner is presumed to have received the March 4, 2009 reconsideration decision on March 9, 2009. 42 C.F.R. §§ 498.40(a)(2); 498.22(b)(3). CMS asserts that Petitioner did not file a request for an extension of time to file its request for hearing pursuant to 42 C.F.R. § 498.40(c)(1). Further, CMS asserts that Petitioner has not claimed any delay in receiving the notice nor attempted to justify in any way the late filing.

CMS further maintains that even if Petitioner had filed its request for hearing in a timely manner, FCSO acted properly in denying Petitioner's enrollment application. CMS contends that FCSO made onsite visits to Petitioner's medical clinic on July 15, 2008, August 4, 2008, August 6, 2008, and September 4, 2008, and no medical providers were present at Petitioner's business address.

CMS asserts that Petitioner's clinic was thus not operational and that FCSO properly determined that Petitioner did not meet the requirements to qualify as a provider of services in the Medicare program. 42 C.F.R. § 424.530.

In its brief, Petitioner argues that the timeliness of its hearing request should not be at issue because the “DAB has already accepted jurisdiction of this matter and has assigned an ALJ to hear the merits of the case.” P. Brief at 6-7. Petitioner also cites 42 C.F.R. § 498.56(b), which states that the ALJ will not consider any issue that arose on or after the date on which it is determined that a supplier no longer meets the conditions for coverage of its services. P. Brief at 7. Further, Petitioner argues that the issue of the timeliness of the filing of the hearing request was not raised at the prehearing conference, when the issues in the case were discussed.

With respect to the merits of the case, Petitioner asserts that it was fully operational at the time of the site visits. Petitioner contends that there are no Medicare rules or regulations or Florida rules or regulations that require a clinic such as Petitioner to be seeing patients any specific number of hours per week, or on any particular days of the week. Petitioner states that it submitted a Medicare re-enrollment application, not an initial application, and that CMS could have examined past billing records for proof that patients were being seen.

1. Petitioner’s hearing request was filed more than 60 days after receipt of FCSO’s March 4, 2009 reconsideration decision, and was therefore untimely.

Petitioner’s right to a hearing is governed by the provisions of the regulations at 42 C.F.R. Part 498. Section 498.40(a)(2) of 42 C.F.R. expressly provides that:

[an] affected party or its legal representative or other authorized official must file the request [for hearing] 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.

The FCSO’s March 4, 2009 letter containing the reconsideration decision is an “initial, reconsidered, or revised determination” within the meaning of 42 C.F.R. § 498.40(a)(2). The letter concluded by advising Petitioner that if it was not satisfied with the decision, it could file an appeal to an ALJ for further administrative review. The letter further advised Petitioner that it must file a written appeal with the Departmental Appeals Board “within 60 days after the date of receipt of this decision” and listed the information that was required to be included in the request for a hearing. The letter advised Petitioner that “[f]ailure to timely request a review by the ALJ is deemed a waiver of all rights to further administrative review.”

Petitioner is presumed to have received the FCSO's March 4, 2009 letter five days after the date of the notice, unless it is shown that the letter was received earlier or later. 42 C.F.R. §§ 498.40(a)(2), 498.22(b)(3). Petitioner did not mention in its hearing request any delay in receiving the letter or state when the letter was received. Therefore, in accordance with the regulatory presumption, Petitioner is presumed to have received the FCSO's March 4, 2009 letter on March 9, 2009.

Thus, the latest date by which Petitioner could have filed a timely hearing request consistent with 42 C.F.R. § 498.40(a)(2) was May 8, 2009, 60 days after March 9, 2009. Petitioner's request for hearing was undated. It was received by the Departmental Appeals Board, Civil Remedies Division, on July 20, 2009. The filing of Petitioner's request was clearly beyond the 60 days stipulated in the regulations. Therefore, Petitioner's hearing request was untimely.

2. Petitioner has not shown good cause for its untimely hearing request.

Petitioner has not filed a request for an extension of time for filing its request for hearing pursuant to 42 C.F.R. § 498.40(c)(1). To extend the period for filing, the "affected party or its legal representative . . . may file with the ALJ a written request for extension of time stating the reasons why the request was not filed timely." 42 C.F.R. § 498.40(c)(1). I may extend the time for filing the request "for good cause shown." 42 C.F.R. § 498.40(c)(2). Good cause has been interpreted by the Departmental Appeals Board as circumstances beyond the ability of the party litigant to control. *Hillcrest Healthcare, L.L.C.*, DAB No. 1879 (2003); *Hospicio San Martin*, DAB No. 1554 (1996).

In this case, Petitioner has not even attempted to advance an argument as to why its request for hearing was filed late. Petitioner has presented no arguments that its late filing was due to circumstances beyond its control.

As a "defense" to the timeliness issue, Petitioner claims that because the "DAB has already accepted jurisdiction of this matter" and assigned me to hear it, I can no longer consider issues related to the timeliness of the hearing request. P. Brief at 6-7. Petitioner argues further that the timeliness issue "was not an issue which was raised at the prehearing conference, when the issues in the case were announced." P. Brief at 7.

Petitioner's arguments are misguided and flawed. Under 42 C.F.R. § 498.70(c), an ALJ may "[o]n his or her own motion, or on the motion of a party to the hearing . . . dismiss a hearing request either entirely or as to any stated issue" when the affected party has not filed a hearing request timely and the time for filing has not been extended. Thus, when

a hearing request has not been filed timely, dismissal by an ALJ is appropriate, and a decision on the merits will not be issued. Further, the purpose of the telephonic prehearing conference that I convened with the parties was to discuss the manner in which this case would proceed. That CMS may not have raised the timeliness issue at the conference does not mean it was precluded from doing so in its initial brief. Moreover, I find no prejudice to Petitioner because it had the opportunity to respond to the timeliness issue in its response brief.

I find that Petitioner has not demonstrated good cause for its untimely hearing request. Petitioner has not shown that it filed the hearing request after the 60-day requirement due to circumstances beyond its control.

III. Conclusion

Because Petitioner did not timely file its hearing request, and no good cause justifies extending the time for filing, I grant CMS's motion and order this case dismissed. 42 C.F.R. § 498.70(c).

/s/

Alfonso J. Montaña
Administrative Law Judge