

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Flores Home Health Care, Inc.,
(NPI: 18717772863)

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-13-479
Decision No. CR2795

Date: May 28, 2013

DECISION DISMISSING REQUEST FOR HEARING

I dismiss the hearing request of Petitioner, Flores Home Health Care, Inc. Petitioner is not entitled to a hearing in this case because it failed to file its request timely. Furthermore, Petitioner failed to establish good cause for its late filing.

I. Background

Petitioner is a home health agency. It participated in the Medicare program and its participation in that program was governed by provisions of the Social Security Act and by implementing regulations. Its hearing rights in this case are governed by regulations at 42 C.F.R. Part 498.

On March 25, 2012, the Centers for Medicare and Medicaid Services (CMS) revoked Petitioner's Medicare enrollment and billing privileges. CMS issued an unfavorable reconsideration decision and Petitioner requested a hearing before an administrative law judge (ALJ). The case was assigned to me for hearing and decision. On September 4, 2012, I remanded the case to CMS for further review. CMS issued a new reconsideration decision on October 31, 2012, affirming its decision to revoke Petitioner's Medicare enrollment and billing privileges. As part of its decision, CMS told Petitioner that it had a right to request a hearing within 60 days from receipt of the decision if it wished to contest CMS's determination. The decision included both the addresses to which

Petitioner could mail its hearing request and instructions on how to file a hearing request through the e-filing system of the Departmental Appeals Board (DAB). CMS Attachment (CMS Att.) 1.

On February 27, 2013, a staff member employed by Petitioner's counsel, Garrett Betancourt, corresponded via email with the DAB's Acting Deputy Director of the Civil Remedies Division. Mr. Betancourt asserted that he had uploaded Petitioner's hearing request on December 3, 2012. He acknowledged that, unlike another hearing request he had e-filed also on December 3, 2012, he never received an email regarding the uploading or any confirmation that he had successfully e-filed Petitioner's hearing request. CMS Att. 2. Mr. Betancourt's email was accompanied by Petitioner's hearing request. The Civil Remedies Division docketed Petitioner's hearing request on February 27, 2013 as docket number C-13-479 and this case was reassigned to me.

On March 28, 2013, CMS e-filed a Motion to Dismiss (CMS Motion), on the ground that the hearing request was not timely filed, with two attachments, which CMS identified as CMS Att. 1 and CMS Att. 2. On April 17, 2013, Petitioner e-filed its Opposition to Respondent's Motion to Dismiss (P. Opposition) accompanied by 11 exhibits, identified as P. Ex. 1 - P. Ex. 11. It should be noted that Petitioner's proffer consisted of over 100 pages, and not one of them among all 11 proffered exhibits was marked in accordance with Civil Remedies Division Procedures § 9. On May 6, 2013, CMS replied to Petitioner's Opposition to Respondent's Motion to Dismiss (CMS Reply). I admit CMS's attachments and Petitioner's exhibits into the record of this case.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Petitioner is entitled to a hearing.
2. Assuming Petitioner is not entitled to a hearing as a consequence of its not having filed a timely hearing request, should it be granted a hearing because it established good cause for filing its request untimely?

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading.

1. Petitioner is not entitled to a hearing because it failed to file a timely hearing request.

Regulations governing hearings state that, in order to be entitled to a hearing, a party *must* file its request no later than 60 days from the date that it receives a reconsideration decision from CMS. 42 C.F.R. § 498.40(a)(2).¹ If a hearing is not timely filed and no extension was granted, an ALJ may dismiss the hearing request. 42 C.F.R. § 498.70(c).

In this case the reconsideration decision was dated October 31, 2012. CMS Att. 1. It is presumed that Petitioner received the decision on Monday, November 5, 2012. Petitioner had 60 days, until Friday, January 4, 2013, in which to file a hearing request. Petitioner's hearing request was received by the DAB on February 27, 2013, well past the 60-day time period. CMS Att. 2. Consequently, Petitioner is not entitled to a hearing because its hearing request is untimely.

2. Petitioner did not establish good cause for failing to file its hearing request timely.

Applicable regulations provide that an ALJ may extend a party's deadline for filing its hearing request – in effect, giving a party a hearing even though it filed its request beyond the presumed deadline – based on that party's showing of good cause. 42 C.F.R. § 498.40(c)(2). The term “good cause” is not defined in the regulation. However, it has been the subject of much litigation and it has acquired an accepted interpretation based on a common-sense approach to the facts in each case under consideration. *Brookside Rehabilitation & Care Center*, DAB No. 2094, at 7 (2004); *Hillcrest Healthcare, L.L.C.*, DAB No. 1879, at 5 (2003). Good cause is thus interpreted more broadly than simply a circumstance beyond a party's ability to control which prevents that party from filing its request timely, as may have been suggested in *Hospicio San Martin*, DAB No. 1554 (1996). But, as will be seen, the term is not so elastic as to cover every failure by a litigant to observe and comply with reasonable procedural requirements.

Petitioner purports to rely on FED. R. CIV. P. 60(b) as establishing the definition of good cause. It argues that the rule allows a judge to relieve a party from the effect of a judgment, order, or proceeding, based on proof of mistake, inadvertence, surprise, or excusable neglect. P. Opposition 5-6. It asserts, in effect, that the Rule 60(b) standard

¹ The presumed date of receipt of any notice sent by CMS is five days from the mailing date. 42 C.F.R. § 498.22(b)(3).

operates to establish good cause for purposes of 42 C.F.R. § 498.40(c)(2). I disagree with this analysis because this proceeding is not governed by the Federal Rules of Civil Procedure. The rule cited by Petitioner is simply inapplicable. *Apple Home Health Services, Inc.*, DAB CR1706, n.6 (2007).²

My discretion to grant a hearing in a situation where the request has not been timely filed is limited under the interpretation of good cause. Good cause might exist in the situation where some outside force causes a facility not to file a request timely, or when a reasonable interpretation of circumstances would suggest that a facility was unaware of the fact that a period for filing had begun to run. But good cause *never* exists where a facility fails to file a request as a consequence of some event or circumstance which was within its ability to control but which it failed to control. For example, negligence by a facility's staff or representative is never good cause for failing to file a hearing request timely. *Jacques Losman, M.D.*, DAB CR2270 (2010).

In this matter, Petitioner submitted an affidavit from Petitioner's counsel's legal assistant, Garrett Betancourt. First, the affidavit is neither signed nor dated. Second, Mr. Betancourt asserts that he was aware that the DAB e-filing system would generate an email confirming a successful upload of a hearing request. On the same day that he purportedly uploaded Petitioner's hearing request, Mr. Betancourt uploaded a hearing request for another party and he received a confirmation email. Affidavit of Garrett Betancourt, ¶ 9; CMS Att. 2. However, Mr. Betancourt admits that he "never received an email with regard to the uploading or confirmation for the Flores request." CMS Att. 2. It came to Mr. Betancourt's attention that Petitioner's hearing request had not been accepted by the DAB e-filing system in January of 2013. Affidavit of Garrett Betancourt, ¶ 10. But, nothing was done to attempt to properly file Petitioner's hearing request or to request an extension of time until February 27, 2013. CMS Att. 2. Petitioner's argument that Mr. Betancourt believed in good faith that Petitioner's hearing request had been successfully uploaded is not supported by the evidence. The actions of Petitioner's counsel's legal assistant are within the control of Petitioner and, as I discuss above, the negligence of this individual cannot be a basis for finding good cause as the regulation intends that term. What appears in this record is comparable to the petitioner's efforts in *Kids Med (Delta Medical Branch)*, DAB No. 2471 (2012) to cobble together, after the fact, an explanation for its lapse. And as in *Kids Med*, the effort fails to bring itself within any reasonable definition of the term "good cause" as set out in 42 C.F.R. § 498.40(c)(2).

² Petitioner also relies on a bankruptcy case governed by Bankruptcy Rule 9006(b) which is similarly inapplicable. P. Opposition at 6.

III. Conclusion

I dismiss the hearing request of Petitioner, Flores Home Health Care, Inc. Petitioner is not entitled to a hearing in this case because it failed to file its request timely. Furthermore, Petitioner failed to establish good cause for its late filing.

_____/s/_____
Richard J. Smith
Administrative Law Judge