

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
San Tomas Convalescent Hospital,)	Date: January 27, 2010
(CCN: 05-5884),)	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-10-68
)	Decision No. CR2062
Centers for Medicare & Medicaid)	
Services.)	

DECISION

For the reasons set forth below, I dismiss as untimely the hearing request filed by Petitioner, San Tomas Convalescent Hospital (Petitioner or facility).

I. Background

The following facts are not in dispute:

Petitioner is a skilled nursing facility located in San Jose, California that participates in the Medicare program as a provider of services. Following a survey completed on July 2, 2009, the Centers for Medicare & Medicaid Services (CMS) determined that the facility was not in substantial compliance with program requirements. In a notice letter dated August 5, 2009, CMS advised Petitioner that, based on its noncompliance, CMS would impose remedies (a \$2500 per instance civil money penalty and denial of payment for new admissions, effective August 20). CMS exhibit (Ex.) 1.

The notice further advised Petitioner that, if it disagreed with CMS's determination, it could request a hearing before an administrative law judge (ALJ). The letter said that the

written request for a hearing must be filed **no later than sixty (60) calendar days** from the date of receipt of this notice.

(We remind you that . . . since this notice is being sent to you by facsimile, your appeal must be filed **no later than sixty (60) days** from the date indicated on this notice.) See 42 C.F.R. § 498.40(a)(2).

(emphasis in original) CMS Ex. 1, at 4. The letter also pointed out the procedural rules governing the hearing process (42 C.F.R. Part 498, Subpart D), “emphasized” that the request must specify the basis for contending that CMS’s findings and conclusions are incorrect, and warned that

[i]f a hearing request does not fully comport with the timing and specificity requirements of 42 C.F.R. § 498.40, CMS will promptly move, as appropriate, for summary judgment . . . and/or dismissal of your entire filing.”

CMS Ex. 1, at 4. The notice then told Petitioner where to send the request (“**Such a request must be made directly . . . to . . .**”) and provided the address for the Civil Remedies Division of the Departmental Appeals Board. CMS Ex. 1, at 4.

In a letter dated October 21, 2009, Petitioner “advised” that it was “in the process of preparing” a formal hearing request and would “forward the same in the near future.”¹ The letter includes no explanation for the late filing, and does not ask that the period for filing be extended.

CMS now moves to dismiss the request as untimely.²

II. Discussion

*Petitioner is not entitled to a hearing because it did not file a timely hearing request and no good cause justifies extending the time for filing.*³

Section 1866(h) of the Social Security Act authorizes administrative review of determinations that a provider fails to comply substantially with Medicare program

¹ Three months later Petitioner submitted, as an exhibit in this matter, its “formal hearing request.” The document is dated January 15, 2010.

² CMS accompanies its motion and brief with three exhibits (CMS Exs. 1-3). With its brief in opposition, Petitioner submits six exhibits (P. Exs. 1-6).

³ I make this one finding of fact/conclusion of law.

requirements “to the same extent as is provided in section 205(b) [of the Act].” Under section 205(b), the Secretary must provide reasonable notice and opportunity for a hearing “upon request by [the affected party] who makes a showing in writing that his or her rights may be prejudiced” by the Secretary’s decision. The hearing request “*must* be filed within sixty days” after receipt of the notice of CMS’s determination. (emphasis added). Act, section 205(b). The 60-day time limit is thus a statutory requirement. *See Cary Health and Rehabilitation Center*, DAB No. 1771, at 8-9 (2001).

Similarly, the regulations mandate that the affected party “file the request in writing within 60 days from receipt of the notice . . . unless that period is extended . . .” 42 C.F.R. § 498.40(a). On motion of a party, or on his/her own motion, the ALJ may dismiss a hearing request where that request was not timely filed and the time for filing was not extended. 42 C.F.R. § 498.70(c).

Here, the language in CMS’s notice letter is clear and unconditional -- Petitioner’s appeal had to be filed within 60 days of receipt, and, because the notice was sent by facsimile machine, it was, in fact, received on the date it was sent. Thus, to challenge the July 2, 2009 survey findings, Petitioner’s hearing request had to be filed no later than October 5, 2009 (October 4 was a Sunday).

Petitioner’s October 21, 2009 hearing request was therefore untimely, and, absent a showing of good cause for my granting an extension of time in which to file, should be dismissed pursuant to 42 C.F.R. § 498.70.⁴

Petitioner argues that good cause justifies its failure to file timely, citing a law suit it filed in a California state court challenging a separate, state-imposed civil money penalty of \$80,000. According to Petitioner, it reasonably believed that the state court action was “sufficient to reserve its rights.” P. Br. at 3. Petitioner concedes that it was represented by counsel in the state court action, but claims that it did not tell its attorneys about CMS’s notice letter until after the 60-day deadline “because it believed that the Superior Court complaint filed in this matter encompassed the issues raised in the August 5, 2009 notice.” P. Br. at 3.

⁴ Petitioner’s October 21, 2009 letter plainly does not satisfy regulatory requirements. *See* 42 C.F.R. § 498.40(b) (the hearing request must 1) identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and 2) specify the basis for contending that the findings and conclusions are incorrect). Nevertheless, for purposes of resolving CMS’s motion to dismiss, I consider it valid.

I note first that Petitioner identifies no responsible individuals and proffers no witness declaration or other evidence to support its claims as to what it believed when it opted to disregard CMS's explicit instructions.

Moreover, Petitioner's contention is not only largely unsupported, it is unreasonable. Petitioner submits the first page of its state court complaint. Nothing in that submission suggests that the state court action even mentioned CMS's imposition of penalties. Neither CMS nor any other federal defendant is named in the law suit, which, according to its introductory paragraph, challenges only the *state* citation and *state* penalty. P. Ex. 5. If Petitioner truly thought that, notwithstanding the unambiguous language of CMS's notice letter, it would preserve its hearing rights before this tribunal by filing such a lawsuit (in the wrong forum, against a different respondent, complaining about a different penalty), it acted unreasonably and its actions do not constitute good cause.

The Board has repeatedly rejected claims that facility efforts to resolve disputes in other forums constitute good cause for missing a filing deadline. *Quality Total Care, L.L.C. d/b/a The Crossings*, DAB No. 2242 (2009) (engaging in informal efforts to resolve a dispute and requesting a hearing are not mutually exclusive alternatives); *Hillcrest Healthcare, L.L.C.*, DAB No. 1879 (2003) (election to resolve dispute by other means does not excuse failure to file a timely hearing request). Where, as here, a party consciously chooses, for reasons of its own, not to request a hearing, it must accept the consequences of its inaction – loss of its right to an in-person hearing. *Hillcrest Healthcare, L.L.C.*, DAB No. 1879; *Hammonds Lane Center*, DAB No. 1853 (2002); *Nursing Inn of Menlo Park*, DAB No. 1812 (2002); *see also Hospicio San Martin*, DAB No. 1554 (1996) (participants in the Medicare program necessarily agree to adhere to all program requirements, and may not evade those requirements by asserting ignorance or confusion).

III. Conclusion

Because Petitioner did not file its hearing request a within 60 days of receiving CMS's notice letter, and no good cause justifies my extending the time for filing, I dismiss its request. 42 C.F.R. § 498.70(c).

/s/
Carolyn Cozad Hughes
Administrative Law Judge