Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of: Quality Total Care, L.L.C. d/b/a The Crossings, Petitioner, - v. - Centers for Medicare & Medicaid Services.	DATE: April 16, 2009 App. Div. Docket No. A-09-18 Decision No. 2242

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Quality Total Care, L.L.C. d/b/a/ The Crossings (The Crossings) appealed the dismissal of its request for hearing as to noncompliance findings and remedies imposed by the Centers for Medicare & Medicaid Services (CMS) as a result of an August 16, 2007 survey. Administrative Law Judge José A. Anglada (ALJ) dismissed the request on the grounds that The Crossings did not timely file a hearing request from an August 23, 2007 Imposition Notice and failed to show good cause for extending the time for filing. Partial Dismissal of Petitioner's Request for Hearing dated June 13, 2008 (ALJ Ruling).

For the reasons set forth below, we uphold the ALJ's dismissal of this hearing request.

Applicable law

Federal statutes and regulations provide for surveys to evaluate the compliance of nursing facilities with the requirements for participation in the Medicare and Medicaid programs and for remedies to be imposed when a facility is found not to comply substantially. Sections 1819 and 1919 of the Social Security Act; 42 C.F.R. Parts 483, 488, and 498.[1]

When CMS imposes such remedies, a facility may request a hearing before an Administrative Law Judge. 42 C.F.R. §§ 498.3(b)(13); 498.5. To do so, the facility must file the hearing request -

> in writing within 60 days from receipt of the notice of the initial, reconsidered, or revised determination unless the period is extended in accordance with paragraph (c) of this section.

42 C.F.R. § 498.40(a)(2). Paragraph (c) provides:

> (c) *Extension of time for filing a request for hearing.* If the request was not filed within 60 days—
> (1) The affected party . . . may file with the ALJ a written request for extension of time stating the reasons why the request was not filed timely.
> (2) For good cause shown, the ALJ may extend the time for filing the request for hearing.

Section 498.3(b) sets forth a range of actions that constitute "initial determinations by CMS." Subsection 498.3(b)(13) provides that "a finding of noncompliance that results in the imposition of a remedy specified in [42 C.F.R.] § 488.406" is an initial determination. The remedies CMS imposed here, including a civil money penalty (CMP) and a denial of payment for new admissions (DPNA), are among those specified in section 488.406.

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[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.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.

Standard of review

Our standard of review on a disputed finding of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Guidelines for Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs, www.hhs.gov/dab/guidelines/prov.html. Our standard of review on an ALJ's exercise of discretion in determining whether to extend filing time based on "good cause" is whether the ALJ abused his discretion. Hillcrest Healthcare, L.L.C., DAB No. 1879, at 5 (2003).

Background

The following facts are undisputed.

On August 16, 2007, the Florida Agency for Healthcare Administration (state agency) conducted a complaint survey of The Crossings' facility (August survey).[2] CMS Ex. 1.[3] The state agency found that The Crossings was not in substantial compliance with regulations related to care plans (42 C.F.R. § 483.20(d)(3)), accident prevention (section 483.25(h)), posting of nursing staffing (section 483.30(e)), and administration (section 483.75). Id. Three of the citations were related to elopements by residents. The agency also determined that these deficiencies posed immediate jeopardy to The Crossings' residents. Id.

On August 23, CMS faxed to The Crossings an Imposition Notice based on the August 16 survey. CMS Ex. 2. The remedies set

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[2] The events underlying this dispute occurred in 2007. Hereafter, we omit the year in such date citations.

[3] All references to exhibits are to the exhibits attached to CMS's Motion to Dismiss, The Crossings' Response, or the ALJ Exhibits 1 and 2. The Crossings marked its exhibits with letters A through D. We refer to them, as the ALJ did, by numbers 1 through 4. The record also contains numbered exhibits related to the merits of the deficiency citations but these are not at issue or cited here.

forth in the notice included a CMP of $4,550 per day, effective June 10 and continuing until substantial compliance was achieved. Id. at 3.

On September 6, the state agency conducted a revisit and complaint survey (September revisit). CMS Ex. 4. The Statement of Deficiencies from that survey cited The Crossings for noncompliance with two requirements unrelated to those cited in the August survey. Id. On September 27, CMS issued a "Change in Remedies Notice" informing The Crossings, inter alia, that, based on the findings of the September revisit, The Crossings had corrected the immediate jeopardy as of August 23 for the elopement deficiencies and the CMP was decreased to $100 effective August 23 and continuing until substantial compliance was achieved. CMS Ex. 3.

In October, an Informal Dispute Resolution (IDR) process was conducted as to findings in the September resurvey. P. Ex. 2; ALJ Ex. 2, at 3. (The parties cite no evidence in the record that indicates that the August survey findings were subject to an IDR process.) On November 13, CMS notified The Crossings that as a result of the IDR "held on October 8, 2007 and the revisit conducted on October 18, 2007," the state agency had determined that The Crossings was in substantial compliance as of September 6, 2007. P. Ex. 2. As a result of the IDR, CMS deleted the two new September revisit noncompliance findings. ALJ Ex. 2, at 3.

On November 21, 90 days after receiving the August 23, 2007 notice about the August survey, The Crossings requested a hearing before an ALJ.

CMS moved to dismiss The Crossings' hearing request as to the August survey on the ground that it was not timely filed. After receiving briefing and evidence from both parties, the ALJ granted CMS's motion on the grounds of untimely filing and failure to show good cause for extending the filing deadline.[4]

[4] The ALJ stated that he was applying the good cause standard adopted by the Board in Hospicio San Martin, DAB No. 1554, at 5 (1996), i.e., "circumstances beyond the ability of the provider to control." ALJ Ruling at 5. On appeal, CMS relies on this standard. CMS Response at 7. Here, we need not

(Continued. . .)

ALJ Ruling. CMS then moved to dismiss the remainder of the case on the ground that the findings from the September revisit had been deleted as a result of the October IDR. After noting that The Crossings had not objected to CMS's motion, the ALJ dismissed the remainder of the hearing request because "no issues remain before me." ALJ Dismissal of Petitioner's Hearing Request, dated September 30, 2007.

Analysis

For the reasons discussed below, we conclude that the ALJ correctly concluded that The Crossings failed to timely appeal CMS's August 23 determination. We further conclude that the ALJ did not abuse his discretion in determining that The Crossings had failed to show good cause for extending the deadline for appealing that determination.

The Crossings argues that the ALJ found its request to be untimely under a "hyper-technical reading" of 42 C.F.R. § 498.40. RR at 4, 5. This argument is baseless. Section 498.40(a)(2) requires a facility to request a hearing on an "initial determination" within 60 days of receipt of that determination. The August 23 Imposition Notice, which set forth a finding of noncompliance that resulted in the imposition of remedies specified in 42 C.F.R. § 488.406, was an initial determination. 42 C.F.R. § 498.3(b)(13). The Crossings does not argue that the August 23 notice was not an initial determination, or dispute that it received the notice on August 23 and filed its hearing request 90 days later on November 21. Therefore, the ALJ correctly found that The Crossings' request was untimely.

Moreover, CMS's August 23 notice informed The Crossings that the 60-day filing deadline applied to that notice. Specifically, the notice set forth a range of remedies including a CMP of $4,550 per day, effective June 10, 2007, and continuing until

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(Continued. . .)
review the definition used by the ALJ because the facts of this case support the ALJ's good cause determination under any reasonable definition of that term. Wesley Long Nursing Center, Inc., DAB No. 1937, at 9 n.7 (2004); Hillcrest, DAB No. 1879, at 5.

substantial compliance was achieved.[5] Id. at 3. The closing section of the notice was titled "**Appeal Rights**" and stated:

> If you disagree with this determination you . . . may request a hearing before an administrative law judge of the Department of Health and Human Services, Departmental Appeals Board. The procedures governing this process are set out in section 498.40, et seq.
>
> **A written request for a hearing must be filed no later than sixty days from the date of receipt of this letter.**

Id. at 5 (bolding in original).

Thus the notice clearly told The Crossings that, under section 498.40, it was required to submit any hearing request within 60 days of its receipt of the notice.

In support of its position that the ALJ abused his discretion in finding lack of good cause, The Crossings points to the fact that the August 23 letter did not set the final amount of the CMP. RR at 4. It argues that it did not receive "adequate notice" of its liability for the CMP until September 27 (id.) and that CMS's failure to "issue a clear position in regard to the magnitude of the potential penalty" should constitute good cause (id. at 5).

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[5] The August 23 notice imposed additional remedies, including -

> discretionary Denial of Payment for New Admissions (DPNA) effective August 25, 2007, if the facility had not returned to substantial compliance by that date;
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> discretionary termination of provider agreement on September 8, 2007, if the facility was still out of compliance on that date; [and]
>
> directed Plan of Correction to be submitted 10 calendar days after receipt of the August 16 Statement of Deficiencies (SOD).

CMS Ex. 2, at 4.

This argument is unsupported by law or the evidence in the record. As the ALJ correctly wrote, "neither the law nor the regulations excuse [The Crossings] from timely seeking an appellate remedy because the final CMP amount is yet to be determined due to the facility's continued status of noncompliance." ALJ Ruling at 7. Indeed, in order to promptly inform facilities about remedies they face, CMS necessarily issues initial determinations without end dates for per-day CMPs or DPNAs because those end dates depend on the facility's corrective actions and a state agency's review of those corrective actions.

Moreover, while we do not hold that the absence of an end date could never be a factor in evaluating good cause, clearly the absence of end dates here should not be a factor. The undisputed evidence shows that, as of August 23, The Crossings knew that CMS had imposed a $4,550 per-day CMP that was already in effect from June 10 through at least the survey date. The September revisit was irrelevant to this portion of the CMP.[6]

In further support of its good cause argument, The Crossings alleges that, after August 23, it "received a series of notices from CMS which made it impossible for the Petitioner to determine whether any penalty would be imposed as result of the [August survey]." RR at 2. These notices, The Crossings asserts, "made it impossible . . . to make a reasoned decision to appeal the matter." Id. at 3. As discussed below, The Crossings' assertions were properly rejected by the ALJ as unsupported and unpersuasive. See ALJ Ruling at 6-7.

First, the Crossings cites correspondence received from CMS dated September 10 and 27. (We refer to the later item as the September 27 retraction. It is different from the September 27 "Change in Remedies Notice" discussed above.) The September 10 item is a CMS notice titled "Compliance Notice" stating that CMS had determined that, as of September 6, The Crossings was in

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[6] Additionally, by September 27, 2007, CMS had notified The Crossings that the end date of the $4,550 per day CMP was August 22. CMS Ex. 3, at 2. Therefore, by September 27 (well before 60-day deadline for appealing the August 23 notice), The Crossings knew not only that the CMP was substantial but also the exact amount of the CMP.

substantial compliance with federal participation requirements. P. Ex. 1. The September retraction stated, "This letter serves to advise you the 'compliance' notice sent to your facility, dated September 10, 2007, has been retracted."[7] P. Ex. 3.[8] These notices address noncompliance found in the September revisit and had no impact on the CMP imposed in the August 23 notice.

Second, The Crossings also relies on a notice that it refers to as dated "September 13, 2007." RR at 3, citing P. Ex. 2. The Crossings is correct that the date on this notice was September 13. However, the reference code above that date was "5835.com.11.13.07.rtf," which, according to CMS, indicates that the actual and correct date for the notice was November 13, 2007. ALJ Ex. 1 (email of April 25, 2008 from CMS counsel). The Crossings did not dispute CMS's assertion before the ALJ. ALJ Ex. 2 (The Crossings' counsel's email of May 6, 2008). Moreover, CMS's assertion is supported by the fact that the text of the notice referred to an IDR proceeding and a state survey agency revisit occurring in October 2007, both of which postdate the September date on which The Crossings relies. Therefore, this notice is irrelevant because The Crossings did not even receive it until after the expiration of the 60-day deadline for appealing the August 23 determination.[9]

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[7] The record contains a statement from a CMS employee about why CMS mistakenly issued the September 10 compliance notice. ALJ Ex. 2, at 3.

[8] A legible copy of this notice is found following the CRD staff attorney's April 17, 2008 request to the CMS attorney for a legible copy.

[9] In its Request for Review, The Crossings states that the September 27 retraction retracted what it incorrectly refers to as the September 13 notice. RR at 3. However, as discussed above, the legible version of the September 27 retraction stated that the notice "dated September 10, 2007 has been retracted." P. Ex. 3. The ALJ similarly discussed the September 27 retraction as if it referred to a September 13 notice. ALJ Ruling at 6 n.3. As explained, the record establishes that the so-called September 13 notice was actually a November 13 notice.

Finally, The Crossings cites the September 27 notice titled "Change of Remedies Notice." RR at 3-4. This notice actually reminded The Crossings about the standards for appealing the August 23 determination. The first paragraph summarized the remedies imposed by the August 23 notice based on the August 16 survey. The last sentence of that paragraph stated: "The August 23, 2007 letter also advised you of your right to appeal the findings of the August 16, 2007 survey." CMS Ex. 3, at 1. The letter went on to inform The Crossings, inter alia, that, based on the September 6 revisit survey, the immediate jeopardy had been abated and the CMP decreased from $4,550 to $100 per day effective August 23. Id. at 2. In a section headed "**Appeal Rights for the September 6, 2007 Revisit Survey**," the letter then informed The Crossings that it was obligated to file any appeal of the remedies imposed as a result of the September revisit "**no later than sixty days from the date of receipt of this letter**." Id. at 5 (bolding in original). Thus, this document gave The Crossings actual notice that the August survey and the September revisit were subject to different appeal deadlines.

In summary, these notices did not, as The Crossings argues, constitute good cause for late filing because they "ma[d]e it impossible for the Petitioner to make a reasoned decision to appeal this matter." RR at 3. The ALJ did not abuse his discretion in concluding that the real problem here was that The Crossings "did not read the [August 23 notice] carefully enough." ALJ Ruling at 6-7.

Finally, The Crossings alleges that "its efforts to resolve the matter without formal proceedings were progressing" (RR at 2) and that it was "engaging in good faith efforts to resolve the disputed surveys with both [the state agency] and CMS" (id. at 4). It asserts that these alleged facts establish good cause because they show that it was "effectively presented with a Hobson's choice: continue to engage in good faith efforts to resolve the disputed surveys (which [the state agency] and CMS were indicat[ing] and stating were inextricably intertwined) or file what may have been a premature appeal when Petitioner did not even know what the result of its efforts were to have been." Id. at 4-5. For the following reasons, we conclude that the ALJ reasonably determined that such assertions failed to establish good cause for untimely filing.

First, The Crossings' factual allegations are completely unsupported. Other than the references discussed above to an IDR proceeding addressing the September revisit findings, there is no evidence about The Crossings' efforts to resolve issues resulting from either survey. Therefore, even assuming that evidence about a course of dealing between a facility and a state agency or CMS after an initial determination could establish good cause, there is no evidence here to even consider.

Second, The Crossings was not presented with a Hobson's choice. Engaging in informal efforts to resolve a dispute and requesting a hearing are not mutually exclusive alternatives. Settlement discussions often occur after appeals are filed.

Third, the Board has previously held that participation in an IDR does not, in itself, excuse a failure to timely file. Concourse Nursing Home, DAB No. 1856 (2002). The Board reasoned that the state IDR process was separate from and in addition to the appeal rights provided to facilities under federal regulations and that the petitioner could not reasonably conclude that participation in an IDR process somehow tolled the federal appeal process.

Fourth, we see no basis for The Crossings' assertion that the issues of the two surveys were "inextricably intertwined" in a way that prevented it from deciding whether it should appeal CMS's August 23 determination. RR at 4-5. As stated above, based on the August survey CMS had already imposed a per-day CMP of $4,550 for noncompliance beginning June 10. The findings in the September revisit had no impact on the CMP in effect through the end of the survey but were relevant only to determining for how long after that the CMP would continue to accrue.

The Crossings misleadingly asserts that the case of Meridian L.P. v. Thompson, 305 F.Supp. 2d 116 (D D.C. 2004), "indicated" that "an appeal filed within sixty (60) days from the receipt of the Notice following the notice related to the re-visit survey should be accepted as timely." RR at 5-6. In fact, the court in Meridian found that CMS had retroactively applied, to the facilities' detriment, a revised policy on the effect of revisit surveys and, therefore, the facilities had shown "good cause"

for failing to file their appeals within 60 days of receiving the initial determinations.[10] Meridian at 123. There is no such factor here.

Finally, The Crossings asserts that an extension of the filing deadline would not prejudice CMS. RR at 5. Lack of prejudice is irrelevant under the circumstances of this case.

Conclusion

For the reasons stated above, we uphold the ALJ's dismissal of The Crossings' hearing request.

/S/
Judith A. Ballard

/S/
Constance B. Tobias

/S/
Leslie A. Sussan
Presiding Board Member

[10] The court upheld the Board's dismissal of the appeals because, as the Board also found, the facilities had then failed to request hearings within 60 days of CMS's notices based on retroactive application of the revised revisit policy. Meridian at 123.