Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Rockmart Health & Rehab, LLC,
(CCN: 11-5330),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-470

ALJ Ruling No. 2016-16

Date: August 1, 2016

RULING

For the reasons set forth below, I dismiss as untimely the hearing request filed by Petitioner, Rockmart Health & Rehab, LLC.

Background

Petitioner is a skilled nursing facility located in Rockmart, Georgia, that participated in the Medicare program until January 2016. The Georgia Department of Community Health (state agency) completed a complaint investigation and recertification survey on December 16, 2015. Based on the survey findings, the Centers for Medicare & Medicaid Services (CMS) determined that the facility was not in substantial compliance with Medicare requirements and that its deficiencies posed immediate jeopardy to resident health and safety. CMS Ex. 1. In a notice letter dated January 5, 2016, CMS advised Petitioner that the facility was not in substantial compliance and that CMS was therefore imposing remedies, including involuntary termination. CMS Ex. 2.

A section of the notice letter – prominently captioned, "**Appeal Rights for December 16, 2015 Survey**" – advises the facility of its right to request a hearing before an

administrative law judge (ALJ) "[i]f you disagree with the survey findings." The letter sets forth the procedures for filing an appeal and cites the regulations that govern such appeals – 42 C.F.R. § 498.40 *et seq*. It explains that the appeal should identify the specific issues, findings of fact, and conclusions of law with which the facility disagrees and should specify the basis for contending that CMS's findings and conclusions are incorrect. CMS Ex. 2 at 3-4.

The letter advises the facility of the filing deadlines: "You must file a written request for a hearing no later than sixty (60) days after receiving this letter." CMS Ex. 2 at 3. CMS sent the letter via federal express, regular mail, and e-mail. The letter also advises the facility that "Receipt of this Notice is Presumed to be January 5, 2016, Date Notice E-mailed." CMS Ex. 2 at 1.

In a letter dated April 8, 2016, Petitioner filed "formal notice of our intent to appeal" the December 16 survey findings. CMS now moves to dismiss Petitioner's "appeal" as untimely, which Petitioner opposes.

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.[1]

Section 1866(h) of the Social Security Act (Act) authorizes administrative review of determinations that a provider fails to comply substantially with Medicare program requirements "to the same extent as is provided in section 205(b) of the [Act]." Under section 205(b), the Secretary of Health and Human Services 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. Act § 205(b) (emphasis added). The sixty-day time limit is thus a statutory requirement. *See Cary Health and Rehab. Ctr.*, 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 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).

[1] I make this one finding of fact/conclusion of law.

No one disputes that the facility received its notice on January 5, which means that its hearing request was due no later than March 5, 2016. Petitioner's April 8 hearing request was therefore untimely and, absent a showing of good cause for my extending the time in which to file, should be dismissed pursuant to 42 C.F.R. § 498.70(c).

No good cause. I treat Petitioner's April 8 letter as a hearing request, even though it does not satisfy regulatory requirements. 42 C.F.R. § 498.40(b); *see Carlton at the Lake*, DAB No. 1829 (2002); *Alden Nursing Ctr. – Morrow*, DAB No. 1825 (2002) (affording the ALJ "discretion" to accept as adequate to preserve a right to hearing requests that fail to identify the specific issues and findings of fact and conclusions of law with which the affected party disagrees and fail to specify the bases for contending the findings and conclusions are incorrect.). In responding to CMS's motion to dismiss, Petitioner refers to its April 8 letter as its appeal. P. Response at 2.

Petitioner's April 8 letter does not directly acknowledge that it missed the filing deadline but explains that the facility is "in the process of compiling pertinent facts and documentation" and suggests that its efforts are hampered by competing demands: from December through March, the state agency surveyed and terminated four facilities (including Petitioner) that were managed by Petitioner's management company. Petitioner also complains that it was "not given due process to refute or correct the deficiencies." Hearing Request; P. Response at 4.

I do not agree.

The regulations do not define "good cause" but leave that determination to the discretion of the ALJ. Looking to regulations governing certain Social Security benefit appeals (which also derive from section 205(b) of the Act), many ALJs have long ruled that "good cause" means circumstances beyond a party's ability to control. *See, e.g., Oak Park Healthcare Ctr.*, DAB CR1917 (2009) ; *Hillcrest Healthcare, LLC*, DAB CR976 (2002), *aff'd* DAB No. 1879 (2003); *Hammonds Lane Ctr., et al.*, DAB CR913 (2002), *aff'd* DAB No. 1853 (2002); *Glen Rose Medical Ctr.*, DAB CR918 (2002), *aff'd* DAB No. 1852 (2002); *Parkview Care Ctr.*, DAB CR785 (2001); *Hospicio San Martin*, DAB CR387 (1995), *aff'd* DAB No. 1554 (1996); 20 C.F.R. § 404.933(c).[2]

[2] The Social Security regulations instruct the ALJ to consider: 1) the circumstances that kept the respondent from making the request on time; 2) whether any agency action misled him; 3) whether the respondent understood the requirements for filing; and 4) whether the respondent had any physical, mental, educational, or linguistic limitation that prevented him from filing a timely request or from understanding or knowing about the need to file a timely request for review. 20 C.F.R. § 404.911.

For its part, the Departmental Appeals Board has avoided articulating a "good cause" standard. *Rutland Nursing Home*, DAB No. 2582 at 5 (2014); *Hammonds Lane Ctr., et al*., DAB No. 1853 n.3; *Wellington Oaks Care Ctr.*, DAB No. 1626 (1997).[3] In any event, the Board has consistently agreed that where a party, by inadvertence or tactical choice, makes no effort to preserve its hearing rights, it must accept the consequences of its inaction – loss of its right to an in-person hearing. *Rutland* at 5; *Hammonds Lane Ctr*. at 1; *Hillcrest Healthcare, LLC*, DAB No. 1978 (2003). Thus, the Board has sustained dismissals where the facility missed a filing deadline because it opted to pursue other avenues (*Rutland*, *Hillcrest*); waited for the results of a waiver (*Kids Med (Delta Medical Branch)*, DAB No. 2471 (2012)); relied on a defunct policy that might have allowed it to correct without incurring a penalty (*Hammonds*); and opted to focus on its plan of correction and resurvey rather than to pursue an appeal (*Nursing Inn of Menlo Park*, DAB No. 1812 (2002).

Here, Petitioner delayed requesting a hearing because its management company had problems with other facilities. That a management company has spread itself so thin that it is unable to address all of its facilities' problems does not constitute good cause. Indeed, preserving hearing rights requires little time or effort, as evidenced by the quality of the request Petitioner filed here, and to do so should have been well within Petitioner's ability.

Finally, with respect to Petitioner's due process complaints, Petitioner had ample opportunity to refute the survey findings, but, by its own inaction, it failed to do so in the manner provided by statute and regulation.

[3] As noted above, the regulation gives the *ALJ* discretion to extend the time for filing. 42 C.F.R. § 498.40(c). ("For good cause shown, the ALJ *may* extend the time for filing the request for hearing."). While the SSA standard is likely the most-widely used for section 205(b) hearings – and its application thus least likely to be considered an abuse of discretion – it is not the only standard an ALJ might reasonably apply, particularly given the absence of controlling regulations or other guidance. In reviewing an ALJ's dismissal, the Board does not decide *de novo* its own view of good cause; rather it determines whether the ALJ abused his/her discretion. "Abuse of discretion" is thus the appropriate standard for reviewing an ALJ's finding of good cause.

Conclusion

Because Petitioner did not file its hearing request within sixty days of receiving the January 5, 2016 notice letter, and no good cause justifies my extending the time for filing, I dismiss its request pursuant to 42 C.F.R. § 498.70(c).

/s/
Carolyn Cozad Hughes
Administrative Law Judge