

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Comfort Home Health Care, Inc.,)	Date: May 18, 2009
(CCN: 15-7567),)	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-177
)	Decision No. CR1952
Centers for Medicare & Medicaid)	
Services.)	
_____)	

DECISION

The September 3, 2008 request for hearing filed by Comfort Home Health Care, Inc., Petitioner, is dismissed pursuant to 42 C.F.R. § 498.70(c) because it was not timely filed. Furthermore, Petitioner has not shown good cause for an extension of time to file the request for hearing.

I. Background

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

This matter is before me based on Petitioner's request for review of Centers for Medicare & Medicaid Services' (CMS) determination to terminate its Medicare provider agreement based on findings made at a recertification survey of Petitioner's agency completed on June 9, 2008 (June survey), by the Indiana State Department of Health (state survey agency). CMS Exhibit (Ex.) 1; CMS Ex. 3, at 1-2. On June 20, 2008, CMS notified Petitioner (June notice) that it was terminating its Medicare provider agreement effective September 5, 2008, unless Petitioner was in compliance with participation requirements by that date. CMS Ex. 3, at 1-3. The June notice also advised Petitioner that it could submit a plan of correction (POC) to address the deficiencies identified at the June survey. The June notice advised Petitioner that the POC would be reviewed upon receipt and, if CMS found it to be acceptable, CMS would ask the state survey agency to conduct a revisit survey of Petitioner's agency in order to verify compliance. CMS Ex. 3, at 2. The

June notice also advised Petitioner that it had a right to request a hearing before an administrative law judge (ALJ) of the Departmental Appeals Board if it wished to contest CMS's determination. In advising Petitioner of that right, the notice stated:

If you desire a hearing, you must request it not later than 60 days from the date you receive this notice.

CMS Ex. 3, at 3.

Petitioner filed a POC on August 7, 2008, for the deficiencies cited in the June survey. CMS Ex. 1. A revisit survey of Petitioner's agency was completed on August 28, 2008 (August revisit), in order to ascertain whether Petitioner had attained compliance with participation requirements. CMS Ex. 4, at 1. Based on the outcome of the August revisit, CMS determined that Petitioner remained out of compliance. Therefore, CMS effectuated termination of Petitioner's Medicare participation on September 24, 2008. CMS Ex. 7. CMS notified Petitioner of its determination to terminate the provider agreement by notice dated September 4, 2008 (September notice). CMS Ex. 7, at 2. The September notice further advised Petitioner that CMS was "administratively extending the termination date to September 24, 2008 to allow sufficient time to publish legal notice of the termination." CMS Ex. 7, at 3. The September notice informed Petitioner that it could submit a POC, and further advised:

If you believe that this determination is not correct, you may request a hearing before an Administrative Law Judge of the Department of Health and Human Services, Departmental Appeals Board. If you desire a hearing, you must request it not later than 60 days from the date you receive this notice.

CMS Ex. 7, at 3.

Petitioner subsequently filed a request for hearing on September 3, 2008. However, Petitioner's request for hearing references and contests only the June notice from CMS. CMS Ex. 6. Petitioner did not file a request for hearing to contest the findings of the revisit survey completed on August 28, 2008.

The case was assigned to me on January 8, 2009 for hearing and decision. On March 6, 2009, CMS filed a motion to dismiss the request for hearing (CMS Br.) on the ground that it was not timely filed. In support of its motion, CMS filed 11 exhibits marked as CMS Exs. 1-11. Petitioner responded to CMS's motion on March 17, 2009 (P. Br.), but did not file any proposed exhibits with its brief. Petitioner did not object to the exhibits offered by CMS. Accordingly, I admit CMS Exs. 1-11 into evidence.

II. Discussion

A. Findings of Fact

1. By letter dated June 20, 2008, CMS notified Petitioner that it was terminating its Medicare provider agreement effective September 5, 2008, based on the deficiencies cited during a June 9, 2008 survey. CMS Ex. 3.
2. On August 7, 2008, Petitioner submitted a POC for the deficiencies cited during the June 9, 2008 survey. CMS Ex. 1.
3. Petitioner filed its request for a hearing by an ALJ on September 3, 2008, appealing the deficiencies cited during the June 9, 2008 survey. CMS Ex. 6.
4. By letter dated September 4, 2008, CMS notified Petitioner of the findings of an August 28, 2008 revisit survey that disclosed Petitioner remained out of substantial compliance with participation requirements. CMS informed Petitioner that it would be terminated from participation in the Medicare program. Petitioner was further informed that CMS was extending the termination date of its Medicare provider agreement from September 5 to September 24, 2008 in order to meet the regulatory requirements for public notice. CMS Ex. 7.
5. Petitioner received CMS's September 4, 2008 notice on September 8, 2008. CMS Ex. 8, at 1, 4.
6. On September 17, 2008, Petitioner submitted a POC in response to the revisit survey of its agency completed on August 28, 2008. CMS Ex. 8.
7. On October 8, 2008, Petitioner wrote to CMS requesting a response to its September 17, 2008 POC submission and that it be resurveyed. CMS Ex. 9.

B. Conclusions of Law

1. Petitioner's request for a hearing, dated September 3, 2008 and contesting CMS's June 20, 2008 notice, was filed more than 60 days after Petitioner is presumed to have received the notice.
2. Petitioner's September 17, 2008 letter to CMS does not constitute a request for hearing.
3. Petitioner has not shown good cause to extend the time to file a request for hearing in this case.

4. Dismissal of a request for hearing that is not timely filed and for which no extension of time to file has been granted is appropriate.

III. Issues

The issues in this case are:

1. Whether Petitioner filed a timely request for hearing and, if not;
2. Whether Petitioner has demonstrated good cause for the untimely filing and should be granted an extension.

IV. Applicable Law

In order to participate in the Medicare program, a home health care agency must execute a “provider agreement” and undergo surveys to certify its compliance with program requirements. 42 C.F.R. §§ 488.20; 489.11. The provider agreement contains assurances that the provider¹ meets, and will continue to meet, applicable conditions for Medicare participation, and also reflects CMS’s acceptance of the provider’s eligibility to participate in the program. 42 C.F.R. §§ 489.11(a); 489.20.

A provider agreement may be terminated by either the provider or by CMS. Section 1866(b) of the Act sets out the conditions under which the Secretary of Health and Human Services (Secretary) may terminate a provider agreement. Section 1866(b)(2)(B) provides that the Secretary may, “upon such reasonable notice to the provider and to the public as may be specified in regulations,” terminate the provider agreement if she determines that the provider “fails substantially to meet the applicable provisions of section 1861.” Title 42 C.F.R. § 489.53 implements the statutory provisions governing termination of a provider, and 42 C.F.R. § 489.53(a)(1) provides that CMS may terminate a provider agreement if it finds that the provider “is not complying with the provisions of title XVIII and the applicable regulations or the provisions of the agreement.” Title 42 C.F.R. § 489.53(d)(1) requires that CMS give the provider notice of termination at least 15 days before the effective date of termination. Title 42 C.F.R. § 489.53(e) states that a provider may appeal the termination of its provider agreement by CMS in accordance with 42 C.F.R. Part 498.

Pursuant to 42 C.F.R. 498.40(a)(2), a provider must file a request for an ALJ hearing within 60 days of receipt of the notice of initial, reconsidered, or revised determinations, unless the period for filing is extended by the ALJ for good cause shown in accordance

¹ The term “provider” is defined in the regulations to include home health agencies and other health care organizations. 42 C.F.R. § 400.202.

with 42 C.F.R. § 498.40(c)(2). Pursuant to 42 C.F.R. § 498.40(a)(2), which incorporates by reference 42 C.F.R. § 498.22(b)(3), the provider is presumed to have received the notice five days after the date on the notice, unless there is a showing that it was, in fact, received by the provider earlier or later.

A. Petitioner failed to file a timely request for hearing to appeal the findings of the June 9, 2008 survey.

The June 20, 2008 CMS letter is a notice of initial determination by CMS that it would terminate Petitioner's provider agreement because Petitioner was not in substantial compliance with program participation requirements. CMS Ex. 3. The June notice clearly advised Petitioner that the deadline for filing a hearing request was not more than 60 days from receipt of the notice. CMS Ex. 3.

Petitioner is presumed to have received the June 20, 2008 notice five days after the date on the notice pursuant to 42 C.F.R. §§ 498.40(a)(2) and 498.22(b)(3). Petitioner does not argue and has not demonstrated that the notice was received on a date later than the presumed receipt date. Here, the fifth day after the date on the notice was Wednesday, June 25, 2008. The 60th day following June 25, 2008 was Sunday, August 24, 2008. Petitioner's request for hearing is dated September 3, 2008, ten days after the 60th day from the presumed receipt of the notice.

A provider's failure to file a request for hearing within the regulatory time period, absent a showing of good cause for such failure, is grounds for dismissal pursuant to 42 C.F.R. § 498.70(c). I have authority to dismiss Petitioner's request for hearing in this case because Petitioner filed its request for hearing 10 days beyond the 60 day period provided by the regulations. Petitioner does not dispute that it received the June 20, 2008 notice nor does it present any real arguments relative to this point in its response. Petitioner's response brief is essentially a three-page chronology of the facts of the case. Based on my review of the entire record in this case I find that Petitioner's request for hearing was not timely filed within the meaning of the regulatory requirement at 42 C.F.R. § 498.40(a)(2), which incorporates by reference 42 C.F.R. § 498.22(b)(3).

B. Petitioner has not made a showing of good cause for its failure to file a hearing request in compliance with the regulatory requirement at 42 C.F.R. § 498.40(c)(2).

Applicable regulations afford an ALJ authority to extend a party's deadline for filing its request for hearing. The authority to extend the time to file a request for hearing is contingent upon a party establishing that good cause exists for its failure to file a timely request for hearing. 42 C.F.R. § 498.40(c)(2). The term "good cause," although not defined in the regulations, has been the subject of much litigation and is interpreted

universally to mean a circumstance beyond a party's ability to control which prevents that party from filing its request timely. *Hospicio San Martin*, DAB No. 1554 (1996).

Petitioner has not denied that it was provided notice by CMS of CMS's intent to terminate its provider agreement, nor has Petitioner asserted that it was unaware of the regulatory requirements governing hearing requests. Petitioner is represented by counsel who is either aware of, or should be aware of, the timeliness requirements of 42 C.F.R. § 498.40(a)(2). Petitioner has offered no satisfactory explanation for its delay in the face of the regulatory requirement for timely filing. Specifically, Petitioner has not contended that there existed events beyond its capacity to control preventing it from filing a timely request for hearing.

As previously noted, Petitioner provides a chronological timeline of events in an apparent effort to provide good cause for its untimely filing. P. Br. at 1. Petitioner notes that it opted to submit a POC which it claims was accepted, and a revisit survey was scheduled. P. Br. at 1. Petitioner further asserts that on September 4, 2008, CMS notified Petitioner that it was extending the termination date to September 24, 2008. P. Br. at 2. Petitioner relies on certain events in the timeline it provides to justify why it submitted its request for hearing untimely. However, Petitioner's reliance on these events is misplaced. Petitioner's submission of a POC and its request for, and CMS's scheduling of, the August revisit do not toll the running of the 60-day appeal period. The filing of a plan of correction and scheduling of a revisit survey are procedures which are separate and distinct from appeal rights provided to Medicare providers under federal regulations. Opting to file a POC does not constitute a substitution for the filing of a request for hearing nor does it in any way establish good cause for failure to file a request for hearing within the regulatory time frame. Petitioner has not established that the failure to file a timely request for hearing was due to circumstances beyond its control.

C. Petitioner did not file a request for hearing challenging the August revisit findings.

Petitioner acknowledges that based on the findings from the August revisit CMS determined that Petitioner remained out of substantial compliance. P. Br. at 2-3. CMS advised Petitioner by notice dated September 4, 2008, that it could submit another POC. Petitioner concedes that the September notice from CMS also advised Petitioner that it had "sixty (60) days from th[e] date that the September 4, 2008 letter was received" to appeal the findings of the August revisit survey. P. Br. at 2.

Petitioner did not file a request for hearing to challenge the August revisit survey findings. Instead, Petitioner, on September 17, 2008, chose to file a "rebuttal response" to the revisit findings as part of its corrective action plan, and its request it be resurveyed. CMS Ex. 8. Petitioner then wrote to CMS on October 8, 2008, requesting CMS to respond to its September 17, 2008 "rebuttal response." CMS Ex. 9. On November 26,

2008, Petitioner, without referencing a request for hearing, wrote to Alan Dorn, the Acting Chief Counsel for the Office of General Counsel, inquiring as to when the ALJ hearing would take place. CMS Ex. 11, at 1. It is unclear as to how Petitioner came to labor under the belief that it had filed a request for hearing. The time period to perfect an appeal of the findings of the August revisit survey, conveyed to Petitioner in the September 4, 2008 notice, had expired. Petitioner is legally presumed to have received CMS's September notice on September 9, 2008. Therefore, Petitioner should have filed its request for hearing no later than Saturday, November 8, 2008. Petitioner did not do so.

While Petitioner does not make specific arguments as to the August revisit survey, Petitioner does assert that its "intentions were to proceed to hearing on this case," and states that its September 8, 2008 letter "referencing a request for hearing" should be recognized as a request for hearing. P. Br. at 2. The September 8, 2008 letter from the law firm of Miller, Canfield, Paddock and Stone, LLC, is addressed to:

CMS
Department of Health, State of Indiana

The letter is directed to: "To Whom It May Concern:" CMS Ex. 11, at 2.

A review of the letter establishes that there was no specific reference to a request for hearing. Rather, the letter states: "Mr. MacKelvie will represent us in our upcoming Administrative Law Judge hearing." CMS Ex. 11, at 2. I find no basis to construe the September 8, 2008 letter as constituting a request for hearing. It neither evidences an intent by Petitioner to request a hearing, nor does it comply in any respect with the requirements for content of a request for hearing as set forth at 42 C.F.R. § 498.40(b)(1) and (2). A party requesting a hearing must specify the issues and CMS's findings of fact and conclusions of law with which it disagrees, and it must specify the basis for contending that these findings and conclusions are incorrect. 42 C.F.R. § 498.40(b)(1) and (2). Petitioner's September 8, 2008 letter fails to even mention the findings of noncompliance that were cited during the August revisit. Indeed, nowhere in the September 8, 2008 letter does Petitioner affirmatively state that it was filing a request for hearing challenging the findings of the August revisit. Therefore, I find Petitioner's assertion that the September 8, 2008 letter constitutes a request for hearing to be without evidentiary support, and is thus unavailing. Therefore, based on my review of the entire record in this case, the only request for hearing filed by Petitioner is the untimely request for hearing dated September 3, 2008.

Petitioner also makes reference to contact with CMS officials and responses from CMS personnel which Petitioner apparently believes supports its contention that a hearing request had been filed. However, Petitioner makes no legal argument as to how those

statements prove a hearing request was filed or how those contacts in any way toll the 60-day time frame to file a request for hearing. Petitioner further argues that the record establishes that there was “frequent participation” by Petitioner and that Petitioner intended to proceed to hearing in this case. P. Br. at 2. Again, Petitioner fails to explain how its conduct fulfills the requirement of filing a timely request for hearing or how such participation and intentions demonstrate good cause. The record is clear that Petitioner filed a single untimely request for hearing appealing the findings of the June survey. Furthermore, the evidence is clear that Petitioner’s request for hearing was not filed within 60 days of CMS’s June notice.

Petitioner had legal representation from two separate law firms, and Petitioner’s counsel knew or should have known the federal appeal processes and related timeline filing requirements. Petitioner may have been actively involved in attempting to preserve its Medicare provider agreement from being terminated, but it failed to preserve its right for a hearing. Both notices issued by CMS clearly and unequivocally provided Petitioner with ample and clear notice of its rights to appeal and the process to be utilized in perfecting such an appeal. CMS Ex. 3; CMS Ex. 7. Petitioner’s response brief does not establish that Petitioner’s late filing was due to circumstances beyond its control, nor do the events support an argument that Petitioner may not have received adequate notice from CMS in a timely manner. Accordingly, Petitioner has failed to show good cause. The burden is squarely on Petitioner to ensure it follows the requirements if it wishes to seek a hearing. Petitioner failed to do so in this case.

V. Conclusion

Having considered the parties’ arguments and the complete record before me, I find that Petitioner failed to file a request for hearing within the applicable regulatory time period as contemplated by 42 C.F.R. § 498.40(a)(2). I further find that Petitioner has not shown good cause to extend the period for filing its request for hearing. Accordingly, the CMS motion to dismiss the request for hearing is granted. For the forgoing reasons, Petitioner’s September 3, 2008 request for a hearing is dismissed.

/s/
Alfonso J. Montano
Administrative Law Judge