Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Lower Oconee Community Hospital Inc.,
(CCN: 11-1321),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-1311

ALJ Ruling No. 2014-39

Date: August 11, 2014

RULING DISMISSING REQUEST FOR HEARING

I dismiss the request for hearing of Petitioner, Lower Oconee Community Hospital Inc., because Petitioner filed the request untimely and did not establish good cause for failing to make a timely filing.

The essential facts are uncomplicated. Petitioner, a hospital, filed a hearing request to challenge the determination of the Centers for Medicare & Medicaid Services (CMS) to terminate Petitioner's participation in Medicare. CMS dated its determination notice April 7, 2014 and sent it to Petitioner on that date via Federal Express. On April 9, 2014, an employee of Petitioner accepted delivery of the notice. CMS Ex. 1. Petitioner filed its hearing request on June 12, 2014, 64 days after it actually received notice of CMS's determination and 66 days after the date that CMS mailed the notice to Petitioner.

Regulations at 42 C.F.R. Part 498 govern Petitioner's hearing rights. In order to be entitled to a hearing an affected party must file a hearing request within 60 days from its receipt of a notice of an adverse determination by CMS. 42 C.F.R. § 498.40(a)(2). The regulations provide additionally that:

> The date of receipt will be presumed to be 5 days after the date on the notice *unless there is a showing that it was, in fact, received earlier or later.*

42 C.F.R. § 498.22(b)(3) (incorporated by reference into 42 C.F.R. § 498.40(a)(2)) (emphasis added). The regulation governing timeliness of filing is uncomplicated and easy to understand. A party must file its request within 60 days of actually receiving the adverse determination from CMS. The deadline may be as long as 65 days from mailing date *but only in the circumstance where the actual delivery date is unknown.* In all other circumstances it is the actual receipt date that starts the 60-day clock running for filing a request timely.

A party that files a hearing request untimely loses its right to hearing unless an administrative law judge extends the deadline for filing. An administrative law judge may dismiss a hearing request where a party files untimely and does not show good cause for its failure to file a timely request. 42 C.F.R. § 498.70(c); *see* 42 C.F.R. § 498.40(c)(2). The term "good cause" has no regulatory definition. In application, the term means a situation that is beyond a party's ability to control that intervenes to prevent the party from filing a timely hearing request. Ordinary negligence by the party requesting a hearing is not good cause to extend a filing deadline. Where there is negligence by the requesting party the failure to file timely is due to something that was within the requesting party's ability to control.

Petitioner actually received CMS's notice on April 9, 2014 and it did not file its hearing request until June 12, 64 days after it received the notice. Petitioner's request is, therefore, untimely because Petitioner did not file it within 60 days of receiving CMS's notice. But, Petitioner's request would be untimely even if the 5-day presumption applied to it, because June 12, 2014 is 66 days after the date of the notice date of April 7, 2014.

Petitioner thus has no right to a hearing absent a showing of good cause for its failure to file a timely hearing request.

Petitioner argues that there is good cause to waive the 60-day requirement in this case because it asserts that counsel for CMS misled Petitioner into believing that it had a right to file its request within 65 days of the notice date even if it actually received the notice in fewer than five days from the notice date. Petitioner's Opposition to Motion to Dismiss (Opposition) at 3 - 4. According to Petitioner, its counsel could not discern when Petitioner received CMS's notice because the notice "provided no indication as to how it was served." Opposition at 3. Petitioner's counsel contacted CMS's counsel and asked him what the deadline was. Petitioner avers that CMS's counsel declared that:

> CMS generally treated the deadline as being 60 days from the date of receipt of a termination notice which CMS presumed to be five days from the date on the termination notice.

Opposition at 3 - 4. Petitioner asserts that it concluded that it had 65 days from the notice date to file its request based on what CMS's counsel purportedly said. Petitioner acknowledges that it filed the request 66 – and not 65 – days after the date of the notice. But, according to Petitioner, its counsel assumed that 65 days meant "two months plus five-days." According to Petitioner, its counsel erroneously assumed that May 2014 had only 30 days. Opposition at 8. Thus, according to Petitioner, its counsel assumed Petitioner had two months (two 30-day months) plus five days within which to file its request and filed on the 66th day due to this incorrect assumption. Petitioner argues that its counsel's error was reasonable and that good cause exists to excuse Petitioner for this simple act of negligence.

I find these arguments to be unpersuasive. First, Petitioner had a duty to learn when it received the notice and to file its hearing request within 60 days of that date. Petitioner easily could have ascertained when the notice was delivered and it had no reason to be uncertain about the delivery date. All Petitioner – or its counsel – had to do was to call Federal Express. Alternatively, Petitioner's counsel simply could have asked CMS's counsel tell her the delivery date of the notice.

Second, there is nothing about CMS's counsel's purported statement to Petitioner's counsel that is misleading. It is entirely consistent with what the regulations state. As I note above, the regulations presume a delivery date of five days from the mailing date *unless* the affected party receives the notice in less time than five days. That is completely consistent with what CMS's counsel allegedly said to Petitioner's counsel. Telling that to Petitioner's counsel could not mislead her into believing that she was entitled to 65 days from the mailing date of the notice, if the actual delivery date of the notice was within five days. CMS's counsel's purported representation did not relieve Petitioner's counsel from her duty to find out the actual date of receipt of the notice and to file a hearing request within 60 days of that date.

Moreover, Petitioner or its counsel could have read the regulations, with or without contacting CMS's counsel. The language of 42 C.F.R. § 498.22(b)(3) that I quote above is utterly unambiguous. Petitioner and its counsel, both sophisticated, had a duty to read that regulation and to understand it.

Indeed, the explicit language of the notice letter that CMS sent to Petitioner reinforces the regulatory language. It states that: "A written request for a hearing must be filed no later than 60 days from the date of receipt of this letter." Anyone reading that language should have known immediately what his or her responsibilities were.

But, even if Petitioner and its counsel were somehow misled, or misled themselves, into believing that Petitioner had 65 days from April 7, 2014 within which to file a hearing request, Petitioner nevertheless filed its request after 65 days elapsed and it offers no valid excuse for its untimeliness. Petitioner offers nothing to show that its counsel's error that resulted in the hearing request being filed on the 66th day after receipt was anything other than ordinary negligence. Such negligence is not good cause for failing to file timely. It was within Petitioner's – and its counsel's – ability to control when to file the hearing request. And, no circumstance that was beyond their ability to control prevented them from filing the request timely.

/s/
Steven T. Kessel
Administrative Law Judge