

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

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In the Case of:)	DATE: October 3, 2002
Mimiya Hospital,)	
Petitioner,)	Civil Remedies CR836
- v. -)	App. Div. Docket No. A-02-22
Centers for Medicare &)	Petition to reopen
Medicaid Services.)	Decision No. 1833
_____)	

RULING ON PETITION TO REOPEN

The Centers for Medicare and Medicaid Services (CMS) petitioned to reopen the Board's decision in Mimiya Hospital, DAB No. 1833 (2002). In that decision, the Board reviewed the appeal of Mimiya Hospital (Mimiya) of a decision by an Administrative Law Judge (ALJ) denying Mimiya's request for a hearing to contest the determination by CMS to impose a civil money penalty (CMP) on Mimiya. The ALJ had denied Mimiya's request for a hearing on the grounds that Mimiya had failed to file its hearing request within the 60-day period specified by the regulations in 42 C.F.R. Part 498. See Mimiya Hospital, DAB CR836 (2001) (ALJ Decision).

The Board, while finding that Mimiya's appeal of a CMP for a determination of immediate jeopardy at Mimiya was untimely filed, remanded another portion of the CMP imposed on Mimiya to the Administrative Law Judge for a hearing. The Board found that a second CMS letter notifying Mimiya of the time period in which it was not in substantial compliance with Medicare participation requirements was an initial determination only with respect to the duration of the deficiency and that Mimiya had timely requested a hearing to determine the duration and the appropriate CMP for that deficiency.

CMS is requesting that the Board re-open that part of the decision and revise its findings on that particular issue. The Board assigned Board Docket No. A-02-118 to CMS's request to re-open.*

The Board may reopen its decision, within 60 days of the date of notice of the decision, upon its own motion or the petition of either party. 42 C.F.R. § 498.100. The regulations do not specify a standard for granting a petition to reopen. Procedures applicable to other types of disputes provide that the Board may reconsider a decision when a party promptly alleges a clear error of fact or law. 45 C.F.R. § 16.13. This standard is reasonably applied here as well. Reopening a Board decision is not a routine step in the Board's review of an ALJ decision. Rather, it is the means for the parties and the Board to point out and correct any errors that make the decision clearly wrong.

In support of its request to reopen, CMS argued that the second CMS notification was not an initial determination as that letter imposed no new remedies on Mimiya, but merely informed Mimiya that it had achieved substantial compliance as of June 23, 2000, and that the previously imposed CMP of \$100 per day was terminated after a 58-day period of noncompliance. CMS contended that its determination that Mimiya had achieved substantial compliance, thus creating an end date to the CMP, was not an initial determination and the Board's decision created an initial determination not contemplated by the regulations. CMS further argued that the Board's decision was inconsistent with earlier decisions that sustained the dismissal of a hearing request because of a lack of timeliness.

CMS's arguments fail to persuade us that the Board's decision was erroneous, and we accordingly deny the petition to reopen. As we stated in our decision, CMS's second notification was an initial determination that Mimiya had failed to achieve substantial compliance until June 23, 2000. If, as CMS's argument suggests, a facility is precluded from appealing the date when it is deemed by a state survey agency to have returned to substantial compliance, a facility will have no recourse when the state survey agency, for whatever reason, delays its revisit to the facility and the CMP continues to run.

CMS's reliance on Cary Health and Rehabilitation Center, DAB No. 1771 (2001), is misplaced. The factual situation presented by that case is not comparable to Mimiya's situation. Furthermore,

* Mimiya has appealed the Board's decision in Federal Court.

the other two ALJ decisions cited by CMS are likewise inapposite, in no way presenting the issue of whether a petitioner may contest a finding of the date a per day penalty stops accruing when it has not contested the original deficiency finding, but was not notified of the duration and total number of days in the original notice.

Contrary to what CMS argued, the Board's decision does not hamper CMS's ability to impose remedies in a timely manner to promote compliance. While Medicare regulations could have been read to require CMS to include the date a per day CMP stops accruing in any notice of a per day CMP, the Board's decision instead interpreted those regulations to permit CMS to give notice of a per day CMP at a point in time when CMS has not yet determined the full number of days that the facility was not in substantial compliance (and to require the facility to timely appeal that determination in order to contest the underlying findings). See 42 C.F.R. §§ 488.434(a)(2)(vi) and 488.430. On the other hand, the Board's holding recognizes the facility's statutory right to notice and an opportunity to be heard. See section 1128A(c) of the Social Security Act. Until the facility has notice of what date CMS finds is the date on which the facility achieved substantial compliance, the facility does not know whether CMS has accepted the facility's position about when it came into compliance. Indeed, the regulations specify that when CMS determines that a facility achieves substantial compliance it must send the facility a separate notice informing the facility of the "number of days involved" (42 C.F.R. § 488.440(d)(1)(ii)), and the facility is entitled to provide documentation that compliance was achieved at an earlier date (42 C.F.R. § 488.440(h)). Mimiya is entitled to attempt to prove earlier compliance, even though it is not entitled to contest the initial deficiency finding.

The Board's decision balances the affected interests by permitting CMS to issue a notice of noncompliance resulting in a per day CMP before CMS has determined the date a per day CMP will stop accruing and by treating as an appealable initial determination a subsequent notice of continued noncompliance resulting in the imposition of a CMP for an additional number of days beyond the date of the first notice. This result is, moreover, consistent with the appeals procedures at 42 C.F.R. part 498, read as a whole. Those procedures recognize that enforcement is a dynamic process, providing for revision by CMS of its determinations and for the addition of new issues prior to a hearing.

Conclusion

For the reasons discussed above, we deny the petition to reopen.

_____/s/_____
Judith A. Ballard

_____/s/_____
Donald F. Garrett

_____/s/_____
Marc R. Hillson
Presiding Board Member