

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Day Op of North Nassau, Inc.,
(CCN: 33C0001035),

Petitioner,

v.

Department of Health and Human Services.

Docket No. C-16-645

ALJ Ruling No. 2017-7

Date: January 6, 2017

**RULING DISMISSING REQUEST FOR
HEARING**

I dismiss the request for hearing filed by Petitioner, Day Op of North Nassau, Inc. Petitioner's hearing request is untimely and Petitioner has not established good cause for the untimely filing.

The Centers for Medicare & Medicaid Services (CMS) filed a motion to dismiss Petitioner's request for hearing and, alternatively, for summary judgment. With its motion CMS filed 25 proposed exhibits that it identified as CMS Ex. 1-CMS Ex. 25. Petitioner opposed the motion and filed three exhibits of its own that it identified as P. Ex. 26-28. I receive these exhibits for purposes of ruling on CMS's motion. I make no findings as to the merits of this case inasmuch as I dismiss Petitioner's hearing request.

Petitioner is an ambulatory service center in New York. On September 26, 2014, the New York Department of Health (State agency) advised Petitioner that it had determined that Petitioner was not complying substantially with applicable Medicare regulations. It advised Petitioner that it could submit a plan of correction to address the deficiencies that the State agency had identified. CMS Ex. 3.

On October 2, 2014, CMS sent a letter to Petitioner advising it that its Medicare participation would be terminated effective December 31, 2014. CMS Ex. 4. It informed Petitioner that it had an opportunity to submit a plan of correction to address outstanding deficiencies. It also informed Petitioner that it had a right to request a hearing before an administrative law judge. *Id.* at 1-2. CMS sent a second letter to Petitioner on January 12, 2015 confirming that it had terminated Petitioner's Medicare participation with an adjusted termination date of January 4, 2015. CMS Ex. 5. Once again, CMS informed Petitioner that it had a right to request a hearing before an administrative law judge. *Id.* at 1-2.

CMS never received a plan of correction from Petitioner. CMS Ex. 22 at 8. Nor did Petitioner request a hearing until April 29, 2016. On that date, counsel for Petitioner wrote to CMS requesting an extension of time within which to file a hearing request. CMS Ex. 19. In that letter Petitioner asserted allegedly extenuating circumstances for not filing a request timely. I address Petitioner's assertions below.

Regulations governing hearings in cases in which CMS is a party state that a party that receives an adverse determination from CMS may file a hearing request within 60 days of its receipt of that determination. 42 C.F.R. § 498.40(a)(2). A party that fails to file its request timely loses its right to a hearing unless an administrative law judge finds good cause to extend the deadline for filing the request. 42 C.F.R. § 498.40(c)(1), (2). An administrative law judge may dismiss an untimely hearing request where an extension has not been granted. 42 C.F.R. § 498.70(c).

There is no doubt that Petitioner failed to file a timely hearing request. Petitioner had 60 days within which to request a hearing from CMS's notification to it of its determination to terminate Petitioner's participation in Medicare. It did not request an extension of the time within which to request a hearing until April 2016, well over a year from the date when CMS effectuated termination of participation.

I find that Petitioner did not establish good cause for its failure to file a hearing request timely. Petitioner argues that it was the victim of negligent and malicious actions by a third party, a company called "Freifeld Associates Consulting" and Scott Freifeld, the owner and operator of that company (I refer to the entity and individual owner collectively as "Freifeld"). Petitioner contends that it retained Freifeld on or about 2013 for the purpose, among other things, of ensuring that Petitioner complied with applicable Medicare participation requirements. Petitioner contends that Freifeld failed utterly to communicate with CMS concerning Petitioner's efforts to remain compliant with Medicare participation requirements. Petitioner asserts, for example, that following the September notification of noncompliance, it prepared a plan of correction addressing the findings of noncompliance and gave that plan to Freifeld for transmission to the State agency or CMS. P. Ex. 26 at ¶¶ 6, 8. It argues that Freifeld willfully failed to transmit this plan. It contends additionally that Freifeld made false representations to CMS, failed

to advise Petitioner that its Medicare participation had been terminated, failed to advise Petitioner of its right to a hearing, and in fact, assured Petitioner that all was well and that Petitioner was being recertified to participate in Medicare. *Id.* at ¶¶ 6-7; P. Ex. 27 at ¶¶ 6-7. Petitioner contends that it did not learn of CMS's determination to terminate its Medicare participation until February 2016 and that belated knowledge was largely the consequence of Freifeld's misfeasance and malfeasance.

Petitioner does not deny that Freifeld was in communication with the State agency and CMS. Nor does it deny that Freifeld received the notifications of adverse determination that CMS sent on October 12, 2014 and January 12, 2015. Indeed, a key element of Petitioner's argument that Freifeld acted maliciously is that Freifeld knew about CMS's actions but withheld that knowledge from Petitioner.

As Petitioner concedes, Freifeld was Petitioner's agent for purposes of dealing with the Medicare program. As far as Petitioner, the State agency and CMS were concerned, Freifeld fully represented Petitioner – was its public face, in fact – in dealing with Medicare. From CMS's perspective, Freifeld was Petitioner.

As I have stated there is no right to an extension of time within which to file a hearing request absent a showing of good cause for failure to file timely. The term "good cause" is not defined in the regulations but it has generally and universally been held to constitute a situation beyond a party's ability to control but for which the party would have filed its hearing request timely. The negligence or misfeasance of a party's employee that causes a hearing request to be untimely filed is not good cause. *Jackson Manor Healthcare*, DAB No. 545 at 5 (1998). An employee is an individual who is under a party's control and that party has the duty to assure that the employee performs his or her duties correctly.

I discern no difference in this case between the acts of an employee or those of an agent. Whether an employee or an agent, the person charged with responsibility for dealing with the Medicare program acts on behalf of the entity that retains his or her services for that purpose and is under the entity's control. A facility is equally responsible for the acts of its agents as it is for those of its employees. In this case I accept Petitioner's assertion that it was the victim of Freifeld's negligent or, perhaps, malicious acts. But, Freifeld was Petitioner's agent and Petitioner bore full responsibility for whatever it was that Freifeld did or did not do. Consequently, Petitioner cannot excuse its failure to file a hearing request timely on the ground that Freifeld failed to act appropriately. For purposes of interacting with Medicare, Freifeld was Petitioner and whatever he did bore Petitioner's imprimatur.

_____/s/_____
Steven T. Kessel
Administrative Law Judge