Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Mathis Nursing Home,	)	Date: February 12, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-427
	)	Decision No. CR461
Health Care Financing Administration.	)	
	)	

DECISION

I dismiss Petitioner's request for hearing because Petitioner did not make it timely, and because Petitioner has not established good cause for failing to make a request for a hearing timely.

I. Background

On August 23, 1996, Petitioner, Mathis Nursing Home, a skilled nursing facility (SNF), made a request for a hearing from a determination by the Health Care Financing Administration (HCFA). The case was assigned to me for a hearing and a decision. HCFA moved to dismiss Petitioner's request for a hearing. Petitioner opposed HCFA's motion.

II. Issues, findings of fact and conclusions of law

The issues in this case are whether Petitioner: made a request for a hearing timely from a determination by HCFA to impose a remedy; or established good cause for not having made a request for a hearing timely from a determination by HCFA to impose a remedy. In deciding these issues, I make the following findings of fact and conclusions of law (Findings). I discuss these Findings in detail, below.

1. On April 18, 1996, HCFA notified Petitioner that it intended to impose remedies against Petitioner, including a denial of payments for new admissions, effective May 5, 1996.

2. On August 6, 1996 HCFA advised Petitioner that payment for new admissions would be denied effective May 5, 1996, and up until and including July 17, 1996.

3. On August 23, 1996, Petitioner requested a hearing.

4. Petitioner made its request for a hearing more than 60 days from the date that HCFA notified Petitioner of HCFA's determination to impose a remedy against Petitioner.

5. The reason that Petitioner did not make its request for a hearing prior to August 23, 1996 is that an employee of the corporation that owns Petitioner failed to exercise his or her responsibility to make a hearing request.

6. A SNF is entitled to a hearing from a determination by HCFA to impose a remedy against the SNF.

7. An entity must make its request for a hearing within 60 days from the date that it receives notice of HCFA's determination to impose a remedy.

8. If an entity does not make its request for hearing timely, it is no longer entitled to a hearing.

9. Where an entity fails to make a request for a hearing timely, it may be given a hearing if it establishes good cause for failing to make its request timely.

10. HCFA's April 18, 1996 notice to Petitioner is a notice of HCFA's intent to impose remedies against Petitioner, and not merely a notice that Petitioner might impose remedies.

11. The 60-day period within which Petitioner had to request a hearing in order to be entitled to a hearing began on the date of Petitioner's receipt of HCFA's April 18, 1996 notice.

12. Petitioner made its request for a hearing untimely, and Petitioner is not entitled to a hearing.

13. Petitioner has not established good cause for failing to request a hearing timely.

III. Discussion

A. The facts (Findings 1 - 5)

On April 18, 1996, HCFA notified Petitioner that, on January 25, 1996, the Texas Department of Human Services had conducted a survey to determine whether Petitioner was in compliance with federal requirements governing participation of nursing homes in Medicare and Medicaid. HCFA Ex. 3.[1] HCFA told Petitioner that the Texas Department of Human Services had concluded that Petitioner was not in substantial compliance with those requirements. Id. at 1. HCFA noted that, in response to the January 25, 1996 survey, Petitioner had submitted a plan of correction and had alleged that it was complying with participation requirements. However, the Texas Department of Human Services had concluded, on the basis of a resurvey conducted on March 27, 1996, that Petitioner remained out of compliance with participation requirements. Id. HCFA advised Petitioner that it concurred with the finding that Petitioner remained out of compliance with participation requirements. Id.

Petitioner was advised that HCFA had determined to impose remedies against Petitioner if Petitioner did not correct the outstanding deficiencies. HCFA told Petitioner that it would terminate Petitioner's participation in Medicare. HCFA Ex. 3. HCFA advised Petitioner also that, effective May 5, 1996, Petitioner would be denied payment for new admissions. Id. HCFA advised Petitioner that, in addition to imposing the remedies of termination and denial of payment for new admissions, it also might determine to impose against Petitioner a civil money penalty of $200 per day, beginning on January 25, 1996, and continuing until Petitioner achieved substantial compliance with participation requirements. Id.

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[1] HCFA submitted seven exhibits (HCFA Ex. 1 - 7) in support of its motion to dismiss Petitioner's request for a hearing. Petitioner submitted two exhibits (P. Ex. 1 - 2) in opposition to HCFA's motion. Additionally, Petitioner submitted as attachments to its brief in opposition to HCFA's motion correspondence from HCFA to Petitioner dated April 18, 1996, July 11, 1996, and August 6, 1996. These letters were submitted also by HCFA as HCFA Ex. 3 - 5. I conclude that there is no need to designate the correspondence submitted by Petitioner as exhibits, because that correspondence duplicates exhibits submitted by HCFA. Finally, Petitioner submitted a verification signed by Joseph Bell. I am designating the verification as P. Ex. 3. Neither party has objected to my receiving any of the exhibits into evidence. Therefore, I receive into evidence HCFA Ex. 1 - 7 and P. Ex. 1 - 3.

The April 18, 1996 notice advised Petitioner that, if it disagreed with HCFA's determination, it could request a hearing. HCFA Ex. 3 at 2. Petitioner was told explicitly that it had 60 days from receipt of the notice within which to request a hearing. Id.

Shortly after the notice was sent to Petitioner, Petitioner submitted a plan of correction. P. Ex. 1. It is unclear whether Petitioner submitted its plan of correction to the Texas Department of Human Services or to HCFA, inasmuch as Petitioner did not offer as evidence any transmittal which may have accompanied the plan of correction. Also, it is not clear on what date Petitioner submitted its plan of correction, although the plan of correction was signed and dated by Petitioner's administrator on April 19, 1996. P. Ex. 1 at 1.

On July 11, 1996, HCFA sent an additional notice to Petitioner. HCFA Ex. 4. This notice reminded Petitioner that, if it did not achieve substantial compliance with participation requirements by July 25, 1996, its provider agreement would be terminated. Id. Additionally, HCFA stated that its records indicated that Petitioner had not requested a hearing concerning HCFA's determination of noncompliance. Id. HCFA told Petitioner that Petitioner should notify HCFA immediately if HCFA's records were incorrect. Id.

There is no evidence of a response by Petitioner to HCFA's July 11, 1996 letter. Petitioner did not assert that it wanted a hearing, nor did it advise HCFA that HCFA's records were incorrect.

On August 6, 1996, HCFA wrote again to Petitioner. HCFA Ex. 5. In this notice, HCFA advised Petitioner that the Texas Department of Human Services had reported that Petitioner had corrected its noncompliance with participation requirements. Id. HCFA advised Petitioner that, because Petitioner had not corrected its deficiencies in a timely manner, the remedy of denial of payment for new admissions would be imposed for the period beginning May 5, 1996 through July 17, 1996. Id. Additionally, HCFA told Petitioner that it might determine to impose against Petitioner a civil money penalty of $200 for each day of noncompliance from January 25, 1996 up to and including July 17, 1996, for a total penalty of $35,000. Id. However, HCFA advised Petitioner that it had not yet determined whether to impose the civil money penalty. Id. HCFA told Petitioner that, if it determined to impose the civil money penalty, it would notify Petitioner of the determination. Id.

On August 23, 1996, Petitioner requested a hearing. HCFA Ex. 6. Petitioner stated that it was appealing the findings of noncompliance stemming from the January 25, 1996 and March 27, 1996 surveys of Petitioner. Id. at 1. Petitioner asserted that HCFA's April 18, 1996 notice had been received by Petitioner and that Petitioner had forwarded the notice to Petitioner's corporate office in Dallas, Texas. Id. at 2. According to Petitioner, the person who was responsible for requesting a hearing on Petitioner's behalf took no action and later resigned at the request of management. Id.

Petitioner averred that its corporate owners did not discover the existence of the April 18, 1996 notice until they saw a reference to that notice in HCFA's August 6, 1996 notice to Petitioner. Id. Petitioner asserted that, upon learning of the April 18, 1996 notice, Petitioner immediately hired outside counsel, who requested a hearing as soon thereafter as was practicable. Id. Thus, according to Petitioner, its failure to request a hearing timely was not the result of conscious indifference, but, rather, was inadvertent and caused by the performance of one employee. Petitioner requested that the time within which it could request a hearing be extended. Id.

From this recitation of the evidence, I find the following. First, Petitioner did not request a hearing within 60 days of its receipt of HCFA's April 18, 1996 notice. Petitioner has acknowledged receiving the notice and not requesting a hearing within 60 days of receipt of the notice. Second, Petitioner's failure to request a hearing within 60 days of receipt of the notice was due to a failure to exercise diligence by a employee in Petitioner's headquarters.[2]

B. Governing law (Findings 6 - 9)

The right of a SNF to a hearing from a determination by HCFA is governed by regulations contained in 42 C.F.R. Parts 488 and 498. Pursuant to 42 C.F.R. § 488.408, a provider may request a hearing from a determination by HCFA of "noncompliance leading to an enforcement remedy." Pursuant to 42 C.F.R. § 498.3(b)(12), a SNF may request a hearing concerning "the finding of noncompliance leading to the imposition of enforcement actions specified in § 488.406 of this chapter, ..." In Fort Tryon Nursing Home, DAB CR425 (1996), I held that these two regulations meant the

[2] HCFA disputes this fact, asserting that Petitioner's explanation for the untimely hearing request is not credible. However, for purposes of this decision, I am making findings of fact in a manner most favorable to Petitioner.

same thing. I held that the regulations entitle a SNF to a hearing from a determination by HCFA that actually results in the imposition of an enforcement remedy against the SNF. Those actions by HCFA that constitute enforcement remedies are specified in 42 C.F.R. § 488.406. They include denial of payment for new admissions, termination, and the imposition of a civil money penalty. 42 C.F.R. §§ 488.406(a), (a)(2)(ii), (a)(3).

The right to a hearing from a determination by HCFA to impose a remedy is a time-limited right. An affected party must file a written request for a hearing within 60 days from the date it receives notice of HCFA's determination. 42 C.F.R. § 498.40(a)(2). An administrative law judge may dismiss a request for a hearing that is not made timely. 42 C.F.R. § 498.70(c).

An administrative law judge may extend an entity's deadline for making a request for a hearing where that party has not made a request timely. 42 C.F.R. § 498.40(c)(2). An entity must establish good cause for not having made its request timely. Id.

The regulation does not define the term "good cause." I find that the term means circumstances that are beyond the ability of the entity who requests a hearing to control, which intervene to prevent that entity from making a timely hearing request. Hospicio San Martin, DAB CR387 at 3 (1995), aff'd, DAB 1554 (1996).

C. Application of the law to the facts (Findings 10 - 13)

As I discuss above, HCFA's first notice to Petitioner that announced HCFA's intent to impose a remedy is dated April 18, 1996. HCFA Ex. 3. In that notice, HCFA announced its intent to impose remedies. These included termination, if Petitioner did not attain substantial compliance by July 25, 1996, and denial of payment for new admissions, beginning on May 5, 1996. Id. at 1 - 2. On August 6, 1996, HCFA confirmed that it had imposed the remedy of denial of payment for new admissions beginning on May 5, 1996, and advised Petitioner that it would continue in effect up until and including July 17, 1996. HCFA Ex. 5. The sequencing of these notices raises the question of whether the period of time during which Petitioner was entitled to request a hearing began to run effective with its receipt of the April 18, 1996 notice announcing HCFA's determination to impose remedies; with imposition of denial of payment for new admissions on May 5, 1996; or on August 6 1996, the date that HCFA confirmed that it had imposed denial of payment for new admissions against Petitioner.

I conclude that, under 42 C.F.R. § 498.40(a), the period of time within which Petitioner was entitled to request a hearing began to run with Petitioner's receipt of the April 18, 1996 notice in which HCFA announced its determination to impose remedies. It is true that the notice announces the imposition of remedies — consisting of possible termination and denial of payment for new admissions — as events which would occur in the future. It is true also that had HCFA rescinded completely its determination to impose a remedy, then Petitioner would not have been entitled to a hearing. Fort Tryon at 5. But, the regulation plainly establishes that, where HCFA determines to impose a remedy at a future date, then the time within which an entity has to request a hearing — assuming that HCFA later imposes the remedy — begins to run with HCFA's first notice to the entity which announces HCFA's determination.

Petitioner now asserts that the April 18, 1996 notice was not a notice of a determination to impose a remedy, but was, in fact, only a notice of HCFA's determination that it might impose a remedy. According to Petitioner, the April 18, 1996 notice merely informs Petitioner that, if Petitioner did not attain substantial compliance with participation requirements, HCFA would consider terminating Petitioner's participation in Medicare, imposing a civil money penalty against Petitioner, and denying Petitioner payment for new admissions. See HCFA Ex. 3. Petitioner asserts that HCFA did not actually determine to impose a remedy against Petitioner until August 6, 1996, when it advised Petitioner that it would impose a denial of payment for new admissions for the period beginning May 5, 1996 through July 17, 1996. See HCFA Ex. 5.

I disagree with Petitioner's characterization of the April 18, 1996 and the August 6, 1996 notices. Petitioner's argument to the contrary, the April 18, 1996 notice plainly constituted a determination by HCFA to impose two remedies against Petitioner. These remedies consisted of termination and denial of payment for new admissions. HCFA Ex. 3 at 1 - 2. HCFA later determined not to impose termination. HCFA Ex. 5. But, the denial of payment for new admissions went into effect on May 5, 1996 and, on August 6, 1996, HCFA ratified its previous determination to impose denial of payment for new admissions. HCFA Ex. 3 at 2; HCFA Ex. 5.

Petitioner did not submit its request for a hearing timely and, thus, is not entitled to a hearing. As I find above, HCFA's April 18, 1996 notice was a notice of HCFA's determination to impose remedies against Petitioner. In order to be entitled to a hearing from that determination, Petitioner was obligated to request a hearing within 60 days of its receipt from the notice. Petitioner did not request a

hearing until August 23, 1996, more than 60 days from its receipt of the notice.

I have concluded that the April 18, 1996 notice constitutes HCFA's notice of imposition of remedies. The fact that the one remedy that HCFA imposed, denial of payment for new admissions, was not imposed until a later date, does not derogate from my conclusion that the April 18, 1996 notice triggered the time within which Petitioner could request a hearing. As I hold above, at Part II.B. of this decision, the trigger date is the date of receipt of the notice of HCFA's intent to impose a remedy, and not the date when the remedy is imposed.[3]

I do not conclude that HCFA's August 6, 1996 notice gave Petitioner hearing rights in addition to those which were created by the April 18, 1996 notice. HCFA Ex. 5. The August 6, 1996 notice does not constitute a determination by HCFA to impose a remedy against Petitioner. Rather, it is an advisory notice which tells Petitioner that HCFA had ratified its previous determination, stated in the April 18, 1996 notice, to impose the remedy of denial of payment for new admissions, effective May 5, 1996. It tells Petitioner also that HCFA was rescinding its previous determination to terminate Petitioner's participation in Medicare. Finally, it tells Petitioner that HCFA had not yet determined whether to impose a civil money penalty against Petitioner.

I do not find that Petitioner established good cause for not requesting a hearing timely. There is no evidence that Petitioner was precluded from requesting a hearing timely by circumstances that were beyond its ability to control. As Petitioner admits, the failure to request a hearing was due to a failure by the corporate employee (who was charged with the responsibility to request a hearing) to carry out his or her assigned duties. The failure by that employee to carry

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[3] That the date which triggers the time period within which a hearing may be requested is the date of an entity's receipt of HCFA's notice of the determination to impose a remedy means that, in the case where HCFA tells a provider that a remedy may be imposed in the future, contingent on events that have not yet occurred, such as the entity's not attaining compliance with participation requirements by a date certain, the entity may have no choice but to request a hearing without knowing whether the remedy actually will be imposed. And, the requirement that an entity request a hearing possibly in advance of the date when the remedy is to be imposed may mean that the entity will ultimately be found to have no right to a hearing should HCFA eventually determine not to impose the threatened remedy.

out his or her assigned duties carries the same consequences that would result if an individual who is the subject of an adverse determination by HCFA fails to timely request a hearing due to error on that individual's part. In either event, the failure to request a hearing is a consequence of avoidable human error and not of an event that was beyond the ability of the individual, or the corporation, to control.

IV. Conclusion

I conclude that Petitioner did not request a hearing timely. I conclude further that Petitioner did not establish good cause for its failure to request a hearing timely. Therefore, I dismiss Petitioner's request for a hearing.

/s/

Steven T. Kessel
Administrative Law Judge