Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Knox County Nursing Home,	)	Date: April 19, 2007
(CCN: 145679/0010561),	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-06-500
	)	Decision No. CR1588
Centers for Medicare & Medicaid	)	
Services.	)	
	)	

RULING GRANTING CMS'S MOTION TO DISMISS

The Center for Medicare and Medicaid Services (CMS) moved to dismiss Petitioner's June 8, 2006 hearing request for untimeliness.[1] CMS filed a motion dated December 14, 2006, seeking dismissal of Petitioner's hearing request, accompanied by a Memorandum of Law (CMS Br.) and 12 proposed exhibits. I have admitted these into evidence as CMS Exhibits 1-12 (CMS Exs. 1-12). Petitioner filed a memorandum in opposition (P. Br.) and two proposed exhibits on February 12, 2007. I have admitted these into evidence as Petitioner's Exhibits 1-2 (P. Exs. 1-2).[2] CMS submitted a reply brief (CMS Rep. Br.) dated March 5, 2007.

[1] Although Petitioner's request for hearing appears to lack the content and specificity required by the applicable regulations, CMS seeks dismissal on grounds of untimeliness. 42 C.F.R. § 498.40(b).

[2] Petitioner marked its two exhibits as Exhibits A and B. However, in order to conform the identification of those documents to Civil Remedies Procedures, I have redesignated them as P. Exs. 1 and 2.

I. Background of the case

This case is before me pursuant to Petitioner's hearing request filed on June 8, 2006. Petitioner is a skilled nursing facility in Knoxville, Illinois, participating in the Medicare and Medicaid programs. As a result of a survey completed on December 7, 2005, the Illinois Department of Public Health (IDPH) notified Petitioner that, based on findings of immediate jeopardy, it was recommending that CMS impose a per instance civil money penalty (PICMP) in the sum of $5,000.

On April 3, 2006, CMS notified Petitioner that it concurred with the recommendations of the state survey agency and was imposing a PICMP. CMS further informed Petitioner that if it disagreed with that determination, a hearing was available before an administrative law judge (ALJ), and that the procedures governing this process are set out at 42 C.F.R. § 498.40, *et seq*. CMS Ex. 8, at 4. Petitioner received the notice on April 7, 2006. CMS Ex. 11, at 6.

After consideration of the written arguments and documentary evidence submitted by the parties, I grant CMS's motion to dismiss. In doing so, I find that the hearing request was untimely filed and the time for filing a request for hearing has not been extended as Petitioner has not shown good cause for its failure to file a timely hearing request.

II. Issues

The issues in this case are:

- Whether Petitioner filed a timely request for hearing; and,
- Whether Petitioner has shown good cause for extending the time to file a request for hearing.

III. Applicable law and regulations

In cases involving CMS, a party is entitled to a hearing only if that party files its request within the time limits established by 42 C.F.R. § 498.40(a)(2), unless the period for filing is extended. In order to be entitled to a hearing, a party must file its request within 60 days from receipt of a notice of a determination by CMS to impose a remedy. The date of receipt of a notice is presumed to be five days after the date on the notice, unless there is a showing of actual receipt on an earlier or later date. 42 C.F.R. § 498.22(b)(3). An ALJ may extend the time within which a hearing request may be filed based on a showing of good cause to justify an extension of time. 42 C.F.R. § 498.40(c)(2). An ALJ may dismiss a request for hearing which is not timely filed. 42 C.F.R. § 498.70(c).

IV. Findings and Discussion

I make findings of fact and conclusions of law (Findings) to support my decision to dismiss the request for hearing. Each finding is noted below in bold, italic face, followed by a discussion of each Finding.

A. Petitioner did not file a timely request for hearing.

CMS sent Petitioner the notice of deficiencies by certified mail on April 3, 2006. CMS Ex. 11. Petitioner does not dispute that it received CMS's notice on April 7, 2006. P. Br. at 1, para. 6. It was not until June 8, 2006, 62 days after Petitioner's receipt of CMS's determination, that Petitioner filed a request for a hearing before an ALJ.

42 C.F.R. § 498.40(a)(2) expressly provides that:

> [an] affected party or its legal representative or other authorized official must file the request for hearing in writing within 60 days from the receipt of the notice of initial, reconsidered, or revised determination unless that period is extended . . . .

The filing of Petitioner's request was clearly beyond the 60 days stipulated in the regulations. Also, 42 C.F.R. § 498.22(b)(3) provides that "the receipt of the notice of [an] initial determination . . . will be presumed to be 5 days after the date of the notice unless there is a showing that it was, in fact, received earlier or later." The five-day presumption set forth at 42 C.F.R. § 498.22(b)(3) does not apply here, since Petitioner received CMS's notice 4 days after the date of the notice. CMS Ex. 11, at 6. Thus, the time for seeking a hearing before an ALJ expired on June 6, 2006.

B. Petitioner is not entitled to an extension of time to file a request for hearing.

Petitioner has not filed a request for an extension of time for filing its request for hearing pursuant to 42 C.F.R. § 498.40(c)(1). Notwithstanding, I will consider its memorandum in opposition to CMS's motion for dismissal as an application for leave to file untimely, which I may grant only upon a showing of good cause. 42 C.F.R. § 498.40(c)(2).

1. Petitioner's arguments.

Petitioner contends that in a telephone conversation on April 17, 2006, Ms. Marianne Wiesen, the facility administrator, was told by Ms. Ellen B. Greif, Principal Program Representative/Acting Branch Manager, CMS (Region V), that the facility had until June 10, 2006, for filing a request for hearing. Consequently, the facility relied on the assertion of the CMS representative in filing the request on June 8, 2006. Thus, Ms.

Wiesen's trust of the advice given to her by Ms. Greif is the basis for which the facility filed its request on June 8, 2006, two days after the 60 day period had ended. P. Br. at 1; P. Ex. 1.

Petitioner claims that because it relied on erroneous information provided by CMS as to the expiration of the time to file a request for hearing, the interests of justice and the discretion of the Departmental Appeals Board should permit this case to go forward. Furthermore, Petitioner posits that the present situation calls for equitable exercise of the ALJ's powers to insure that the facility be given an opportunity to be heard on its request for hearing. P. Br. at 2. Petitioner cites *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) in support of his contention. This case has to do with a controversy as to the power of the Federal Trade Commission to require corporations to file reports showing how they have complied with a decree of the Court of Appeals enforcing the Commission's cease and desist order, in addition to those reports required by the decree itself. Petitioner merely mentions the case but fails to explain how it is relevant to the issue before me.

2. CMS's arguments.

CMS, on the other hand, contends that Petitioner has failed to preserve its right to contest the finding of noncompliance cited during the December 7, 2005-survey because its hearing request was not timely filed. CMS maintains that Petitioner had 60 days from the date of receipt of the April 3, 2006-notice to appeal the finding of noncompliance as well as the imposition of the $5,000 PICMP. CMS adds that because the facility did not file its request for hearing until June 8, 2006, the 62nd day, and has offered no good cause for extending the time period to appeal, the finding of noncompliance at Tag F323, cited during the December 7, 2005-survey, has become final and not subject to review. CMS also alleges that Petitioner has failed to preserve its right to appeal the findings of noncompliance cited during the August 10, 2005 and September 27, 2005 surveys. The deficiencies in those surveys provide a basis for the denial of payment for new admissions (DPNA) imposed by the State of Illinois effective November 10, 2005 through December 24, 2005. The IDPH notified Petitioner that it had 60 days from the date of receipt of the October 5, 2005 imposition of remedies to file an appeal of the DPNA; that is, December 9, 2005. Thus, it is CMS's position that inasmuch as Petitioner did not file its hearing request until June 8, 2006, approximately six months later, and has offered no good cause for extending the time period to appeal, the findings regarding imposition of the DPNA are also final and not subject to review. CMS Br. at 7, 8; CMS Exs. 3, 5.

Finally, CMS posits that even if an official of the agency informed the facility administrator during a telephone conversation that an appeal did not have to be filed until June 10, 2006, it had no reasonable basis to rely on that oral advice to the detriment of what it had already learned from the written notice, which required that a hearing request be filed by June 6, 2006. CMS Rep. Br. at 5.

3. Discussion.

The fundamental issue to be decided here is whether Petitioner has shown good cause to extend the time to file a request for hearing beyond the 60 days provided in the regulations. 42 C.F.R. §§ 498.40(c)(1), (c)(2). Inasmuch as what constitutes good cause is not defined in the regulations, I must look to case law for guidance in pursuit of a definition. The Departmental Appeals Board has held that "good cause" means circumstances beyond an entity's ability to control which prevented it from making a timely request for hearing. *Hospicio San Martin*, DAB No. 1554, at 5 (1996).

In view of the foregoing, I examine the facts of this case to determine what circumstances, if any, beyond Petitioner's control, prevented it from filing a timely hearing request. The thrust of Petitioner's argument in addressing this issue is two-pronged:

- The facility filed the request for hearing late because it relied on the assertion of the CMS representative that it had until June 10, 2006 to do so.

- Because the facility relied on erroneous information provided by CMS as to the expiration of the time to file a request for hearing, I should exercise equitable powers to permit this case to go forward.

The notices of imposition of sanctions dated October 5, 2005 and April 3, 2006, under a heading titled "**Appeal Rights**," advised Petitioner that its facility had a right to contest the findings of noncompliance that resulted in the imposition of remedies, by filing a written request within 60 days of receipt of such notices. CMS Exs. 3, 11.[3]

Where pertinent, 42 C. F. R. § 498.40 provides as follows:

> (a) *Manner and timing of request.* (1) An affected party entitled to a hearing under § 498.5 may file a request for hearing with CMS . . . .

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[3] Petitioner has not advanced reasons for failing to appeal the DPNA imposed pursuant to the August 10, 2005and September 27, 2005 surveys. *See* CMS Ex. 3.

> (2) The affected party or its legal representative or other authorized official must file the request in writing within 60 days from receipt of the notice . . . unless that period is extended . . . .

The inference that I draw from the cited portion of the notice letter, and the regulatory language regarding Petitioner's appeal rights, is that it did not read the information carefully enough. The notice letter of sanction unequivocally makes reference to the specific section of the regulation that establishes that Petitioner has 60 days from the receipt of the notice to appeal the agency action. Had Petitioner read the regulation and counted 60 days from April 3, 2006, it would not have filed the request for hearing on June 8, 2006.

Petitioner has to show that it was prevented from filing a timely request for hearing due to circumstances beyond its control. *Hospicio San Martin*, *supra*, at 2. Petitioner has not come forward with a persuasive argument as to why it did not follow the admonition in the notice letters regarding its right to a hearing. It was within Petitioner's control to read and count 60 days from the date of receipt of the notices; but it either failed to do so, or ignored the regulatory directive. Instead of coming forward with an explanation for not paying attention to the language of the regulation, Petitioner centers attention on the alleged misinformation provided to its administrator by a CMS official. That misinformation, it argues, is the circumstance that made it file untimely. I disagree.

In her affidavit, Ms. Marianne Wiesen states that during a telephone conference that took place on April 17, 2006, Ms. Ellen Greif, a CMS representative, told her that the facility had until June 10, 2006, to request a hearing. P. Ex. 1. She adds that had she been informed of a prior filing date, she would have filed the request prior to June 6, 2006. In other words, there were no circumstances other than the alleged erroneous information received from CMS that resulted in the late submission of a request for hearing. Thus, I find that nothing prevented Petitioner from filing a timely request for hearing.

Nothing that CMS's representative may have told Petitioner regarding the appeal deadline could have the effect of relieving it of the responsibility to act according to the April 3, 2006-notice letter. That notice unequivocally told Petitioner that a request for hearing had to be filed in conformity with the procedures set out in section 498.40. Those procedures require the filing of a request for hearing within 60 days of receipt of the notice of sanctions. Thus, even if Petitioner was told that an appeal did not have to be filed until June 10, 2006, it had no reasonable basis to rely on that to the detriment of what it had already been told in the notice.

Furthermore, Petitioner did not file an untimely *pro se* request for hearing through the facility administrator. It was filed by the facility's legal representative. CMS Ex. 12, at 2. Consequently, it was Petitioner's attorney who relied on a third hand conversation

between Ms. Wiesen and Ms. Greif, rather than comply with the duty to carefully read the notice and apply the regulatory requirements. In fact, the record reflects that as early as December 29, 2005, Petitioner's legal counsel was involved in the survey events and was communicating with the state survey agency. *See* CMS Ex. 12, at 3-4. It is unacceptable for that legal counsel to claim now that Petitioner filed an untimely request for hearing because the facility administrator was given incorrect information as to when that request was due.

As to the October 5, 2005-notice of imposition of remedies, Petitioner has not refuted CMS's showing that appeal of the DPNA sanction was not filed until approximately six months after the expiration of the time permitted by the regulations.

Finally, whereas I am empowered to decide legal and factual issues, I cannot provide equitable relief.

V. Conclusion

Based on the applicable law and undisputed facts, I conclude that Petitioner's hearing request was untimely filed, and good cause does not exist to extend the time for filing. CMS's motion to dismiss is granted.

/s/

Jose A. Anglada
Administrative Law Judge