

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

St. George Health Care Center  
(CCN: 42-5143),

Petitioner,

- v. -

Centers for Medicare & Medicaid Services.

Docket No. C-15-407

ALJ Ruling No. 2015-04

Date: November 21, 2014

**ACKNOWLEDGEMENT AND ORDER OF DISMISSAL**

I hereby acknowledge receipt of Petitioner's request for hearing (RFH) related to the Centers for Medicare & Medicaid Services' (CMS) July 31, 2014 initial determination to impose remedies on Petitioner, St. George Health Care Center. However, because Petitioner's RFH was untimely and Petitioner did not establish that there was good cause to extend the filing deadline, I dismiss the RFH.

**I. Background and Procedural History**

Petitioner is a skilled nursing facility doing business in South Carolina. By initial determination dated July 31, 2014, CMS notified Petitioner that it was out of substantial compliance at an immediate jeopardy level based on the result of a recertification and complaint investigation survey conducted on July 18, 2014. The July 31 determination informed Petitioner that CMS was going to impose enforcement remedies and that Petitioner could seek review of that determination.

In another initial determination dated August 21, 2014, CMS notified Petitioner that an August 7, 2014 revisit survey found that the immediate jeopardy had been removed but

that the facility remained out of substantial compliance. The August 21 determination informed Petitioner that CMS was imposing additional enforcement remedies and that Petitioner could seek review of that determination.

On October 20, 2014, Petitioner filed its request for hearing (RFH) as to the August 21 initial determination. In the RFH, Petitioner requested an “extension of time to file a request for hearing for the penalties identified in the July 31, 2014 letter.” RFH at 1.

Upon receipt of Petitioner’s RFH, the Civil Remedies Division (CRD) treated Petitioner’s RFH as two separate requests for hearing and docketed Petitioner’s hearing request respecting the July 31 initial determination under docket number C-15-407 and respecting the August 21, 2014 survey under docket number C-15-408. **This Acknowledgement and Order of Dismissal addresses only the RFH related to the July 31, 2014 initial determination (docket number C-15-407).** A separate acknowledgement is being issued for the case under docket number C-15-408.

As noted above, Petitioner acknowledges that its RFH pertaining to the July 31, 2014 initial determination was submitted after the 60-day filing deadline required by 42 C.F.R. § 498.40(a)(2).

Petitioner’s October 20, 2014 RFH stated:

We overlooked the time frames [respecting the July 18, 2014 survey] given the number of letters and communications that were occurring at the time. We were working under extenuating circumstances, with frequent communication with survey representatives to assure the safety of residents and implement swift and effective corrective measures. We deeply regret missing this vital submission date but hope that you can grant the extension of the timeframes related to this appeal request so that the facility can continue to focus . . . . [on] corrective actions.

Because Petitioner has provided its argument for late filing of the RFH, I consider whether Petitioner has shown good cause for me to extend the due date of the RFH.

## II. Issues

The general issue presently before me is whether I should dismiss Petitioner’s RFH. The specific issues that I must decide are whether Petitioner’s RFH was untimely and, if so, whether Petitioner had good cause for filing the RFH late.

### III. Analysis

A provider is entitled to a hearing before an ALJ.<sup>1</sup> However, in order for a provider to exercise the right to a hearing, a provider must file its request for hearing no later than 60 days from the date that it receives notice from CMS. 42 C.F.R. § 498.40(a)(2). Receipt of the notice is presumed to be five days after the date of notice unless shown otherwise. *Id.*; 42 C.F.R. § 498.22(b)(3). A provider may request that an ALJ extend the date to file a hearing request; however, the provider must show good cause in order for the ALJ to grant such a request. *Id.* § 498.40(c). If a hearing request is untimely and there is no good cause to extend the filing date, then an ALJ may dismiss the hearing request. *Id.* § 498.70(c).

#### ***A. Petitioner filed an untimely hearing request.***

CMS's initial determination related to the July 18, 2014 survey is dated July 31, 2014. The determination was sent by FedEx and email and the face of the notice letter states that "receipt of this notice is presumed to be July 31, 2014 - date notice emailed." Petitioner had 60 days, until September 30, 2014, in which to file a hearing request. *See* 42 C.F.R. § 498.40(a)(2). On October 20, 2014, Petitioner filed its RFH. However, Petitioner filed that document 20 days after the filing deadline.

Petitioner admits it "overlooked" the filing deadline and "deeply regrets missing this vital submission date." Petitioner claims that there were numerous letters and communications with survey representatives. However, Petitioner does not claim that any of the letters and communications shows that Petitioner requested a hearing at any earlier date than October 20, 2014. I find that Petitioner did not file a timely request for hearing.

#### ***B. Petitioner did not establish good cause for failing to file its hearing request timely.***

If a provider establishes that there was good cause to extend the filing date for a hearing request, then an ALJ can accept an otherwise untimely hearing request. 42 C.F.R. § 498.40(c). The regulations do not define what constitutes "good cause" to extend the filing deadline for a hearing request and the Departmental Appeals Board "has never attempted to provide an authoritative or complete definition of the term 'good cause' in section 498.40(c)(2)." *Brookside Rehab. & Care Ctr.*, DAB No. 2094, at 7 n.7 (2007) (citing *Glen Rose Med. Ctr. Nursing Home*, DAB No. 1852, at 7 n.5 (2002)). However, a basic definition of "good cause" means "[a] legally sufficient reason." *Black's Law Dictionary* 9th ed. (2009) (defined under the second definition of the word "cause"). Therefore, good cause is more than just explaining why a request for hearing is late. *Cf.*

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<sup>1</sup> Skilled nursing facilities are considered providers for the purposes of the Medicare program. 42 C.F.R. § 400.202 (definition of *Provider*).

*Brookside Rehab. & Care Ctr.*, DAB No. 2094, at 7 n.7 (“Here, we need not decide exactly the scope of the ALJ’s discretion under [42 C.F.R. § 498.40(c)] since (under any reasonable definition of that term) the ALJ reasonably determined that [the provider] did not show ‘good cause.’”).

Petitioner states that it “overlooked” the filing deadline. It was busy trying to implement corrective actions. Petitioner states that the penalties are a severe hardship and that if it does not need to pay the civil money penalties imposed it can continue to make permanent changes. It also implies that it might be able to prevail if allowed to continue to appeal because an Independent Informal Dispute Resolution made recommendations that were favorable to Petitioner. RFH at 1-2.

A review of the July 31, 2014 determination shows that it clearly stated that Petitioner had 60 days from receipt of the determination to request a hearing.

If you disagree with enforcement remedies imposed on your facility, you or your legal representative may request a hearing before an administrative law judge of the Department of Health and Human Services, Departmental Appeals Board (DAB). Procedures governing this process are set out in 42 CFR 498.40, et seq.

**A written request for hearing must be filed no later than 60 days from the date of receipt of this letter.**

(Bolding in the original.)

Additionally, the July 31 determination provided the specific address where Petitioner was to mail its RFH to and also noted:

A request for hearing should identify the specific issues, findings of fact and conclusions of law with which you disagree. It should also specify the basis for contending that the findings and conclusions are incorrect. At an appeal hearing, you may be represented by counsel at your own expense.

Moreover, the determination also provided Petitioner with the name, phone number, and email address of a contact person Petitioner could call for any questions.

The determination explicitly advised Petitioner of its right to request a hearing. However, Petitioner does not explain why it disregarded this clear notice of its further appeal rights other than it “overlooked” the filing deadline. Petitioner’s explanation does

not provide a legal excuse for failing to file a hearing request timely and thus does not meet any reasonable definition of good cause. See *Kids Med (Delta Medical Branch)*, DAB No. 2471 (2012) (indicating that negligence by a facility's staff or representative is not good cause for failing to file a timely hearing request even if the petitioner was not represented by an attorney at the time).

Dismissal of a hearing request is appropriate when the determination clearly explained the filing requirements and deadlines to the petitioner. See *Vanguard Vascular & Vein, PLLC, Trent E. Proffitt, M.D., and Franklin S. Yau, M.D.*, DAB No. 2523, at 3 (2013) (upholding dismissal when the reconsidered determination correctly explained in “unambiguous and conspicuous language” that the petitioners had 60 days from their receipt of the reconsidered determination to request a hearing before an ALJ); *Waterfront Terrace, Inc.*, DAB No. 2320, at 6, 8 (2010) (holding that no good cause existed to justify extending the filing deadline where the notice letter reasonably informed the Petitioner of its appeal rights). Because Petitioner has made no showing of good cause for filing its hearing request almost three weeks after the expiration of the 60-day deadline for doing so, I do not have the authority to extend the filing deadline for the RFH.

#### **IV. Conclusion**

Petitioner filed an untimely RFH related to CMS's July 31, 2014 initial determination and did not show that there was good cause for extending the filing deadline. Therefore, I dismiss Petitioner's RFH with respect to that July 31 initial determination.

\_\_\_\_\_/s/  
Scott Anderson  
Administrative Law Judge