Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

West Side House LTC Facility
Docket No. A-17-13
Decision No. 2791
May 18, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE ORDER

West Side House LTC Facility (West Side) appeals an Administrative Law Judge's dismissal of its request for hearing. *West Side House LTC Facility*, ALJ Ruling No. 2016-19 (September 9, 2016) (ALJ Dismissal). The ALJ concluded that West Side was not entitled to a hearing because it did not file a timely hearing request and that no good cause justified extending the time for filing.

For the reasons explained below, we sustain the ALJ Dismissal.

Legal background

Skilled nursing facilities and nursing facilities such as West Side must comply with federal requirements in order to participate in Medicare and Medicaid. The Social Security Act (Act) and regulations provide for the Centers for Medicare & Medicaid Services (CMS) and state agencies to survey facilities to evaluate their compliance with program requirements and to impose remedies, including civil money penalties (CMPs), on facilities that are not in substantial compliance with the requirements. Act §§ 1819, 1919; 42 C.F.R. Parts 483, 488.[1]

Surveyors report survey findings in a Statement of Deficiencies (Form CMS-2567), identifying the severity and the scope of each deficiency. 42 C.F.R. § 488.404; CMS State Operations Manual (SOM), CMS Pub. 100-07, Ch. 7, § 7400.5.1; SOM App. P (available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html). The Statement of Deficiencies includes a letter for

[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. "Substantial compliance" means a level of compliance with the participation requirements such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm. 42 C.F.R. § 488.301.

each deficiency corresponding to its scope and severity. *Id*. A level "G" citation represents an isolated deficiency causing actual harm that is not immediate jeopardy. SOM § 7400.5.1.

Section 1866(h)(1) of the Act and 42 C.F.R. Part 498 permit skilled nursing facilities and nursing facilities to appeal specific types of "initial determinations" that result from surveys by requesting an ALJ hearing. The "initial determinations" that facilities may appeal include, with exceptions not relevant here, a CMS "finding of noncompliance leading to the imposition of enforcement actions specified in § 488.406 or § 488.820 of this chapter," including CMPs. 42 C.F.R. § 498.3(b)(13).

A facility must file its request for an ALJ hearing within 60 days of the facility's receipt of the notice of the initial determination. 42 C.F.R. § 498.40(a)(2). The ALJ may extend the time for filing a hearing request "[f]or good cause shown." 42 C.F.R. § 498.40(c). An ALJ may dismiss a hearing request where the request was not timely filed and the time for filing was not extended. 42 C.F.R. § 498.70(c). A party may request Departmental Appeals Board (Board) review of an ALJ dismissal order. 42 C.F.R. §§ 498.80 and 498.82.

A skilled nursing facility or nursing facility may ask to participate in an independent informal dispute resolution (IIDR) process if CMS imposes a CMP against the facility and seeks to collect and escrow the CMP pending an appeal by the facility. Act §§ 1819(h)(2)(B)(ii)(IV), 1919(h)(3)(C)(ii)(IV); 42 C.F.R. §§ 488.331(a)(3), 488.431; *See* 76 Fed. Reg. 15,106-15,128 (Mar. 18, 2011); SOM § 7213. The IIDR "results are recommendations to the State and CMS and are not subject to a formal appeal." SOM § 7213.4. "CMS retains ultimate authority for the survey findings and imposition of [CMPs.]" 42 C.F.R. § 488.431(a); SOM § 7213.3. CMS collects and escrows the CMP upon the earlier of: 1) the date the IIDR is completed; or 2) 90 days after the date of the notice of imposition of the CMP. 42 C.F.R. § 488.431(b)(1); SOM § 7213.4.

Standard of review

The Board reviews a disputed finding of fact to determine whether it is supported by substantial evidence on the record as a whole, and a disputed conclusion of law to determine whether it is erroneous. *See Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs*, https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/participation/index.html. "The standard of review for an ALJ's exercise of discretion to dismiss a hearing request where such dismissal is committed by regulation to the discretion of the ALJ is whether the discretion has been abused." *High Tech Home Health, Inc.*, DAB No. 2105, at 8 (2007), *aff'd, High Tech Home Health, Inc. v. Leavitt*, Civ. No. 07-80940 (S.D. Fla. Aug. 15, 2008).

Case background

The following facts are undisputed and are drawn from the ALJ Dismissal and the record before the ALJ.

The Massachusetts state survey agency (state agency) surveyed West Side on December 29, 2015, January 4, 2016, February 24, 2016, and March 8, 2016. Based on the survey findings, CMS determined that West Side was not in substantial compliance with Medicare and Medicaid requirements.

By letter dated March 10, 2016, CMS notified West Side that it was not in substantial compliance with multiple requirements based on the December 29, 2015, January 4, 2016, February 24, 2016, and March 8, 2016 surveys and that CMS was imposing remedies, including CMPs of $1,450 per day for 57 days (December 29, 2015 - February 23, 2016) and $250 per day from February 24 until the facility achieved substantial compliance. CMS Ex. 1. CMS stated that due to the seriousness of the deficiencies, it intended to collect and escrow the CMP; therefore, West Side could "request an Independent Informal Dispute Resolution (IIDR)." *Id.* at 3-4. The notice told West Side that it had the right to request a hearing before an ALJ if it disagreed with the determination and gave West Side instructions for filing an appeal. The instructions specifically stated, "An appeal/request for hearing must be filed no later than sixty (60) calendar days from the date of your receipt of this letter." *Id.* at 4.

Under the heading "REMINDER," the March 10, 2016 notice listed "specific timeframes to which your facility must comply[.]" *Id*. at 5-6. The specified timeframes included that "[a] request for IIDR must be made within 10 calendar days of your receipt of this notice per the instructions noted above;" and that "[r]equesting an IIDR will not stop the imposition of any enforcement remedy." *Id*. at 6, ¶ 1. The reminder also included, in pertinent part, that "[a] request for appeal must be made electronically, per the instructions noted above, within 60 calendar days of the date of your receipt of this notice…. An IDR/IIDR that has not been completed will not stop the time clock for appealing an action, nor will it prevent the imposition of any enforcement remedy, including termination." *Id*. at 6, ¶ 3.

West Side received the March 10, 2016 CMS notice on March 14, 2016. CMS Ex. 3.

By letter dated March 24, 2016, CMS notified West Side that the state agency had determined based on a recent revisit survey that West Side had achieved substantial compliance. CMS Ex. 2, at 1. The notice told West Side that the total CMP was $86,150.00 and that it was "due … on or before **MAY 19, 201[6]**."[2] *Id.* at 1-2 (emphasis

[2] The year captioned in the notice was 2015, an obvious error. As discussed below, West Side understood that the due date was May 19, 2016.

in original). "If an appeal is not filed, or a check is not received by this date," the letter continued, "interest will accrue at the current Federal Annual Interest Rate of 9.75%." *Id.* at 2. The letter was signed by CMS Health Insurance Specialist B.K., who provided her telephone number and email address for West Side to contact her if West Side "ha[d] any questions." *Id.* at 3.

West Side filed a request for IIDR. West Side Response to CMS's Motion to Dismiss, Ex. 1.[3]

West Side filed a request for an ALJ hearing on June 17, 2016. As summarized above, the ALJ dismissed the appeal, and West Side appealed the ALJ Dismissal to the Board. In its request for Board review, West Side "does not dispute the facts as set forth" in the ALJ Dismissal but asserts that "there are additional facts not included, which should be considered in the determination of whether Petitioner had good cause" for filing late its June 17, 2016 appeal. RR at 1.[4] In support of its appeal, West Side submitted new evidence in the form of two exhibits. Below we discuss why we do not admit the new exhibits into the record and why we uphold the ALJ Dismissal.

New evidence

West Side submitted the following new evidence with its appeal of the ALJ Dismissal: 1) a letter dated August 26, 2016 from the state agency to West Side; and 2) a revised Statement of Deficiencies marked "printed" on August 26, 2016. West Side refers to the documents respectively as "Appeal Exhibits" 1 and 2.[5] RR at 2.

Section 498.86 of the regulations permits the Board to admit new evidence into the record if the evidence is relevant and material to an issue before the Board. We decline to admit the documents into the record because they are not material to the issue before us – that is, whether the ALJ abused her discretion in concluding that West Side had not established good cause for an extension of the deadline to file its request for a hearing. The two new documents relate to the State's reduction of the scope and severity of the

[3] The exhibit that West Side submitted in response to CMS's Motion to Dismiss West Side's hearing request indicates that West Side requested informal dispute resolution (IDR) rather than IIDR. Before the ALJ and the Board however, the parties describe the process that West Side requested, and in which it participated, as IIDR. Accordingly, "IIDR" is the term we use.

[4] West Side's request for review is not paginated. The document consists of seven total pages, the last of which is the signature page and certificate of service. The statement referenced here appears on the first of the seven pages of the document under the heading "I. Background".

[5] West Side also submitted a third document that it denominated "Appeal Exhibit 3," but that document is actually a duplicate copy of CMS Ex. 1 (March 10, 2016 CMS notice) so is not "new evidence".

noncompliance following IIDR. As we discuss later, the State's action is not material since CMS has no authority to extend an appeal deadline, that authority being vested by regulation in the administrative law judges, and since the IIDR process does not toll the regulatory appeal deadlines.

Analysis

A. The ALJ's conclusion that West Side's June 17, 2016 hearing request was untimely is supported by substantial evidence and free from legal error.

As summarized above, section 498.40(a) of the regulations requires an "affected party entitled to a hearing" to file its request "in writing within 60 days from receipt of the notice of initial … determination unless that period is extended …." An ALJ may dismiss a hearing request if the "affected party did not file a hearing request timely and the time for filing has not been extended." 42 C.F.R. § 498.70(c).

In this case, the undisputed evidence shows that West Side received the March 10, 2016 CMS determination on March 14, 2016. CMS Ex. 3. West Side filed its appeal on June 17, 2016, approximately 95 days after it received the CMS determination. The notice plainly informed West Side of its right to appeal the determination and the time period in which it must submit any request for an ALJ hearing. Based on the 60-day filing period provided under section 498.40, West Side's appeal was due no later than May 13, 2016.

The evidence and applicable regulations therefore support the ALJ's conclusion that the hearing request was untimely and, "absent a showing of good cause for [her] extending the time in which to file, should be dismissed pursuant to 42 C.F.R. § 498.70." ALJ Dismissal at 3. Indeed, West Side concedes that it "filed its Request for Hearing beyond the sixty-day regulatory timeframe provided by 42 C.F.R. § 498.40(a)(2)." RR at 6.[6] West Side argues, however, that it had good cause for extending the deadline because "it believed in good faith that it was granted an extension by CMS" and because of the "unconscionable injustice of CMS leading [West Side] to believe it had been successful with its IIDR up to 2 days before the appeal deadline, only to allegedly (verbally) overturn the IIDR 5 days after the appeal deadline[.]" *Id.*

[6] As noted above, West Side's request for review is not paginated. The statement referenced here appears on the sixth page under the heading "III. Conclusion."

B. The ALJ did not abuse her discretion in determining that West Side had not established good cause for an extension of time in which to file its appeal.

The regulations at 42 C.F.R. Part 498 do not define "good cause," and the Board "has never attempted to provide an authoritative or complete definition of the term…." *Rutland Nursing Home*, DAB No. 2582, at 5 (2014) (citations omitted). We need not precisely explain the term's meaning here because West Side's contentions, addressed below, are not supported by the record and would not justify extending the hearing request deadline under any reasonable definition of "good cause."

As the ALJ observed, CMS's March 10, 2016 "notice letter was not ambiguous." ALJ Dismissal at 4. A section of the notice titled, "**APPEAL RIGHTS**," told West Side that it had the right to request a hearing before an ALJ if it disagreed with CMS's determination. CMS Ex. 1, at 4-5 (emphasis in notice). The notice stated that the "appeal rights are set out in the Federal regulations at 42 C.F.R. § 498.40, et seq." *Id.* at 4. The letter continued, "An appeal/request for hearing must be filed no later than sixty (60) calendar days from the date of your receipt of this letter." *Id.* Moreover, as noted above, the last section of the notice, titled "**REMINDER**," reiterated among other things: "A request for appeal must be made electronically … within 60 calendar days of the date of your receipt of this notice." *Id.* at 5-6 (emphasis in notice).

West Side acknowledges that the due date for its appeal was May 13, 2016, 60 days after it received the March 10 notice, and that it did not meet that deadline. However, West Side argues that it reasonably believed, based on the exchange of emails between its Executive Director/Owner, K.R., and CMS Health Insurance Specialist, B.K., that CMS extended the deadline to file its request for an ALJ hearing to June 18, 2016. RR at 2. West Side contends that the emails show that the parties had "a clear understanding … that as of May 11, 2016, the level G citations had been overturned as a result of the IIDR process" and, consequently, an appeal would not be necessary. *Id.* at 4. Yet, West Side states, B.K. emailed K.R. on May 18, 2016, five days after the appeal deadline, stating that CMS had decided that the level G deficiencies would remain as written and that the CMP was due to be paid no later than June 18, 2016.

Under these circumstances, West Side argues, "there is good cause to justify extending the time for filing" its hearing request because it "believed in good faith" that the extension to June 18 applied "to both the CMP and the appeal deadlines as it had, up until the May 13, 2016 deadline, believed that the IIDR had overturned the level G citations making an appeal unnecessary." *Id.* at 2, 3, 6. In addition, West Side states, it filed its request for IIDR on January 26, 2016, and the IIDR should have been completed within 60 days of the request – well before the due date to file its appeal. *Id.* at 2, 4, citing SOM § 7213.3. Yet, West Side asserts, the full IIDR process was not actually completed until

August 26, 2016. West Side argues, "It would be an unconscionable injustice for CMS to lead a facility to believe the IIDR overturned the two citations driving the enormous amount of the CMP, and then [be permitted to] uphold the level G citations 5 days after the appeal is due and 84 days after the IIDR [request] had been filed." *Id.* at 5.

1. *We reject West Side's claim that it reasonably believed that CMS extended the deadline for requesting an ALJ hearing, an action CMS does not have authority to take.*

West Side's argument that it reasonably believed that CMS extended the deadline for it to file its ALJ hearing request to June 18, 2016 is meritless. The regulations at 42 C.F.R. Part 498 vest authority to extend the period for a facility to file a hearing request exclusively with an ALJ and not with CMS. 42 C.F.R. § 498.40(c). As the ALJ noted, CMS's March 10, 2016 notice referred West Side to these regulations, which specifically direct the affected party to file its request for extension with the ALJ and provide that the ALJ has the authority to extend the time for filing. ALJ Dismissal at 4, citing 42 C.F.R. § 498.40(c); *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63 (1984) (holding that those who participate in the Medicare program are supposed to understand program rules). Therefore, there was no reasonable basis for West Side to believe that CMS had the authority to extend the deadline for West Side to request an ALJ Hearing.

Moreover, the regulations provide, and CMS's March 10, 2016 letter plainly advised West Side, that the IIDR process is distinct from and in addition to a facility's right to a formal administrative appeal; that CMS retains ultimate authority for survey findings and the imposition of CMPs; and that participation in IIDR will not toll a hearing request deadline. 42 C.F.R. §§ 488.331(a)(3), (b) and 488.431(a),(d); CMS Ex. 1, at 3-4 ("OPPORTUNITY FOR INDEPENDENT INFORMAL DISPUTE RESOLUTION"); at 4-5 ("APPEAL RIGHTS"); at 6 ("An IDR/IIDR that has not been completed will not stop the time clock for an action, nor will it prevent the imposition of any enforcement remedy ….). In light of West Side's constructive and actual notice of the separate formal appeal and informal dispute resolution processes for contesting the survey findings, it was incumbent on West Side to timely file its hearing request to protect its right to a formal appeal, whether or not the IIDR was completed prior to the deadline for filing the hearing request.

Even if CMS had the authority to grant an extension of the time for appeal, which it does not, the e-mails on which West Side relies could not reasonably be understood to have done so. The May 16, 2016 email from West Side's Executive Director/Owner, K.R., to the CMS Health Insurance Specialist, B.K., describes their May 11, 2016 conversation as follows:

> We discussed the IIDR committee and their vote to overturn both G level deficiencies and whether this would impact the CMP fine. At that time you were reviewing an email chain and questioning if there was resolution to the committee's decision. You informed me that if in fact the G level deficiencies were removed it would reduce the amount of the CMP. At that time I asked if mailing the full payment was appropriate and your advice to me was to wait and allow you time to review the case.

Second attachment to hearing request. K.R.'s summary of the May 11 conversation shows that he asked B.K. whether the IIDR committee's vote (a recommendation to CMS under the IIDR process) affected the CMP. The plain wording of the sentence, "You informed me that *if* in fact the G level deficiencies were removed it *would* reduce the amount of the CMP," (emphasis added), establishes that B.K. did *not* communicate to West Side that the G level deficiencies had been overturned. Instead, K.R.'s use of conditional language in his description of the conversation shows that B.K. indicated, and K.R. understood, that as of May 11, 2016, B.K. did not know whether the level G deficiencies had been removed or "if there was resolution" on the IIDR committee's recommendation. Consequently, B.K. told K.R. that she needed additional time to "review the case." In light of the wording of the email, we reject West Side's claims that as of May 11, 2016, the parties "had a clear understanding" that the G level citations had been overturned by CMS based on the IIDR committee vote or that CMS had led West Side to believe that there would be no reason for it to file an appeal.

Furthermore, additional language in K.R.'s May 16, 2016 email reveals that the focus of the May 11, 2016 discussion, as well as the May 16, 2016 email itself, was the due date for West Side to pay the CMP. As noted above, CMS had notified West Side in a March 24, 2016 letter that the CMP was due no later than May 19, 2016 and that interest would accrue at a rate of 9.75% if West Side did not make timely payment or file an appeal. CMS Ex. 2. Alluding to the information in CMS's March 24, 2016 letter, K.R.'s May 16, 2016 email begins, "On Wednesday last week you and I spoke regarding West Side House[']s payment that is due May 19th." Second attachment to hearing request. The email concludes: "The deadline for the CMP is currently Thursday, May 19th. In an attempt to avoid any misunderstanding and an interest rate accrual of 9.75%, I am writing this email to clarify our previous conversation and seek your further direction with this matter." *Id.*

B.K.'s email to K.R. two days later, on May 18, 2016, responded to the CMP issues that K.R. raised and gave the direction he requested:

> CMS re-reviewed your survey, the IIDR materials and the IIDR Committee's decision. Based on this review, CMS determined that the "G" level citations at Federal Tags F281 and F333 will remain as written.

> Payment of the CMP will be due on or before June 18, 2016. If your facility has financial documentation that supports financial hardship you may submit that for a financial review….

Id. Thus, CMS told West Side that: 1) the IIDR recommendation had not impacted the level of citations or the amount of the CMP; and 2) payment of the CMP was due no later than June 18, 2016. *Id.* Nothing in the May 18, 2016 email suggests that the June 18, 2016 deadline related to anything other than the due date for the CMP payment.

Accordingly, we concur in the ALJ's conclusion that West Side could not reasonably have understood that CMS had extended the deadline for West Side House to file its ALJ hearing request.

2. We reject West Side's contention that it established good cause for an extension to file its request for an ALJ hearing because the IIDR process was not completed in 60 days.

We also find no merit in West Side's argument that it had good cause for an extension of the deadline to file its request for an ALJ hearing because the IIDR process was not completed within the 60-day period specified in 42 C.F.R. § 488.431(a)(1) and section 7213.3 of the SOM. The regulations explicitly provide that "[f]ailure of the State or CMS, as appropriate, to complete informal dispute resolution timely cannot delay the effective date of any enforcement action against the facility." 42 C.F.R. §§ 488.331(b)(1); 488.331(a)(3) (making 42 C.F.R. § 488.331(b) applicable to IIDR as well as IDR). Likewise, the SOM states that the IIDR "process does not delay the imposition of any remedies, including a [CMP]." SOM § 7213.4. Therefore, the fact that the IIDR process was not completed until after the deadline for West Side to file a request for an ALJ hearing does not excuse or justify its failure to file a timely hearing request. *Cf. Rutland Nursing Home*, DAB No. 2582, at 7 ("[T]he fact that the [state informal dispute resolution] process was completed after the 60-day period for requesting an ALJ hearing does not constitute good cause for extending that period.); *Cary Health & Rehab. Ctr.*, DAB No. 1771, at 27 (2001) (facility's participation in a state informal dispute resolution process does not toll the federal appeal process).

Accordingly, we conclude that West Side's contention that it had good cause to file its request for an ALJ hearing weeks after it was due because the IIDR process was not completed within 60 days has no merit.

Conclusion

For the reasons explained above, we uphold the ALJ Dismissal.

/s/
Sheila Ann Hegy

/s/
Susan S. Yim

/s/
Christopher S. Randolph
Presiding Board Member