Department of Health and Human Services

# DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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| In the Case of: | ) | |
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| Oak Park Healthcare Center, | ) | |
| (CCN: 19-5266), | ) | Date: March 5, 2009 |
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| Petitioner, | ) | |
| | ) | |
| - v. - | ) | Docket No. C-09-239 |
| | ) | Decision No. CR1917 |
| Centers for Medicare & Medicaid | ) | |
| Services. | ) | |
| | ) | |

## DECISION

For the reasons set forth below, I dismiss as untimely the hearing request filed by Petitioner, Oak Park Healthcare Center (hereafter Petitioner or facility).

### I. Background

The following facts are not in dispute:

Petitioner is a skilled nursing facility located in Lake Charles, Louisiana, that participates in the Medicare program as a provider of services. Following a complaint investigation survey completed on August 7, 2008, the Centers for Medicare and Medicaid Services (CMS) determined that the facility was not in substantial compliance with program requirements. In a notice letter dated October 8, 2008, CMS advised Petitioner that, based on its noncompliance, CMS would, among other penalties, terminate the facility's Medicare provider agreement, effective February 7, 2008, unless the facility achieved substantial compliance before that date. CMS Ex. 1; P. Ex. 2.

The notice further advised Petitioner that, if it disagreed with CMS's determination, it could request a hearing before an administrative law judge (ALJ). The letter said that the "written request for hearing must be filed no later than December 7, 2008 (60 days from the date of receipt of this letter via fax)." CMS Ex. 1, at 3. The letter also pointed out the procedural rules governing the hearing process, 42 C.F.R. § 498.40 *et seq*., and told

Petitioner that its request for hearing should "identify the specific issues, and the findings of fact and conclusions of law" with which Petitioner disagrees, and should specify the bases "for contending that the findings and conclusions are incorrect." CMS Ex. 1, at 2-3.

In a subsequent letter, dated December 3, 2008, CMS advised Petitioner that, based on the findings of an October 24, 2008 revisit, the facility remained out of substantial compliance, so, among other remedies, its provider agreement would terminate on February 7, 2009. The letter also advised Petitioner that it could request an ALJ hearing to challenge the determination of noncompliance for the October 24, 2008 survey, and that such request "must be filed no later than February 1, 2009 (60 days from the date of receipt of this letter via fax)." CMS Ex. 2, at 2; P. Ex. 4, at 2. The notice then repeated CMS's earlier instructions as to the procedural and content requirements for the hearing request.

Following two additional revisit surveys (which are not the subject of this appeal), CMS determined that the facility still failed to achieve substantial compliance. CMS then extended the facility termination date to February 11, 2008, to allow for appropriate publication of the termination notice, and so notified Petitioner in letters dated January 27, 2009, and February 5, 2009. CMS Exs. 3, 4; *See*, 42 C.F.R. § 488.456.

In a letter dated February 3, 2009, Petitioner requested an expedited hearing and an extension of time in which to file its hearing request.

CMS now moves to dismiss the hearing request as untimely.[2]

## II. Discussion

### *A. Petitioner is not entitled to a hearing because it did not file a timely hearing request and no good cause justifies extending the time for filing.*[3]

The parties agree that Petitioner's hearing request was not timely filed.

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[2] CMS accompanies its brief with four exhibits (CMS Exs. 1-4). With its brief in opposition (P. Opp. Br.), Petitioner submits five exhibits (P. Exs. 1-5) and two attachments.

[3] My findings of fact and conclusions of law are set forth, in italics and bold, in the discussion captions.

Section 1866(h) of the Social Security Act authorizes administrative review of determinations that a provider fails to comply substantially with Medicare program requirements "to the same extent as is provided in section 205(b) [of the Act]." Under section 205(b), the Secretary must provide reasonable notice and opportunity for a hearing "upon request by [the affected party] who makes a showing in writing that his or her rights may be prejudiced" by the Secretary's decision. The hearing request "must be filed within sixty days" after receipt of the notice of CMS's determination (emphasis added). Act, section 205(b). The 60 day time limit is thus a statutory requirement. *See*, *Cary Health and Rehabilitation Center,* DAB No. 1771, at 8 - 9 (2001).

Similarly, the regulations mandate that the affected party "file the request in writing within 60 days from receipt of the notice . . . unless that period is extended . . . ." 42 C.F.R. § 498.40(a). On motion of a party, or on his or her own motion, the administrative law judge (ALJ) may dismiss a hearing request where that request was not timely filed and the time for filing was not extended. 42 C.F.R. § 498.70(c). Under §§ 498.40(a)(2) receipt is "presumed to be 5 days after the date on the notice unless there is a showing that it was, in fact, received earlier or later."

Here, the language in both of CMS's notice letters is clear and unconditional: Petitioner's appeal had to be filed within 60 days of receipt, and, because the notices were sent by facsimile machine, they were, in fact, received on the dates they were sent. Thus, to challenge the August 7, 2008 survey findings, Petitioner's hearing request had to be filed no later than December 7, 2008, and, to challenge the October 24, 2008 revisit findings, the request was due no later than February 1, 2009.

Petitioner's February 3, 2009 hearing request was therefore untimely, and, absent a showing of good cause for my granting an extension of time in which to file, should be dismissed pursuant to 42 C.F.R. § 498.70.

Petitioner does not claim that it filed a timely appeal, but argues that good cause justifies its failure to file earlier, listing the following reasons:

- the deadline for the facility to achieve substantial compliance and avoid the imposition of any remedy was after the deadline to appeal, and the facility "had every reason to believe it would achieve substantial compliance timely";

- until the appeal deadline had passed, no one advised the facility that the survey agency would conduct only three revisit surveys to determine if it had achieved substantial compliance;

and

- until the appeal deadline had passed, no one advised the facility that its Medicaid provider agreement would be terminated along with its Medicare agreement.[4]

P. Opp. Br. at 6.[5] None of these reasons constitutes good cause.

The regulations do not define "good cause" but leave that determination to the discretion of the ALJ. Looking to regulations governing certain Social Security benefit appeals for guidance, many ALJs have ruled that "good cause" means circumstances beyond a party's ability to control. *See, e.g., Hillcrest Healthcare, L.L.C.*, DAB CR976 (2002), *aff'd* DAB No. 1879 (2003); *Hammonds Lane Center, et al.*, DAB CR913 (2002), *aff'd* DAB No. 1853 (2002); *Glen Rose Medical Center*, DAB CR918 (2002), *aff'd*, DAB No. 1852 (2002); *Parkview Care Center*, DAB CR785 (2001); *Hospicio San Martin*, DAB CR387 (1995), *aff'd*, DAB No. 1554 (1996); 20 C.F.R. § 404.911; 20 C.F.R. § 404.933(c).[6] CMS urges me here to adopt that standard. CMS Motion to Dismiss at 4-7. Petitioner opposes, characterizing such a standard as unreasonable, creating "an impossible-to-satisfy standard [that] effectively denies any extension of the deadline, contrary to the intent of the regulation." P. Opp. Br. at 6-7.

The Departmental Appeals Board has never reached the issue of whether "good cause" is limited to circumstances beyond a party's ability to control. *Hammonds Lane Center, et*

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[4] Petitioner should have known that the loss of its provider agreement jeopardized its receipt of Medicaid payments. Under the Social Security Act and its implementing regulations, federal financial participation (FFP) is available under the Medicaid program for services provided in a properly certified facility. Social Security Act, section 1905(a)(4); 42 C.F.R. § 440.40. Upon termination or expiration of the facility's provider agreement, FFP may continue for up to 30 days. 42 C.F.R. § 441.11. Moreover, in a letter dated August 20, 2008, the Louisiana Department of Health and Hospitals specifically told Petitioner that its failure to submit an acceptable plan of correction "may result in termination of your Medicaid Provider Agreement." P. Ex. 1, at 1.

[5] Petitioner also raises some constitutional claims, arguing that the entire appeal process violates its procedural and substantive due process rights. P. Opp. Br. at 7. I have no authority to adjudicate constitutional claims.

[6] Under those regulations, to determine whether good cause exists, the ALJ considers 1) the circumstances that kept Respondent from making the request on time; 2) whether any SSA action misled him; 3) whether Respondent understood the requirements for filing; and 4) whether Respondent had any physical, mental, educational, or linguistic limitation that prevented him from filing a timely request, or from understanding or knowing about the need to file a timely request for review. 20 C.F.R. § 404.911.

*al*., DAB No. 1853, at n. 3; *Wellington Oaks Care Center*, DAB No. 1626 (1997). Nevertheless, the Board has consistently ruled that where, as here, a party consciously chooses, for reasons of its own, not to request a hearing, it must accept the consequences of its inaction – loss of its right to an in-person hearing. *Hammonds Lane Center* at 1; *Hillcrest Healthcare, L.L.C.* DAB No. 1879 (2003).

Petitioners in *Hammonds* complained that their reliance on an informal CMS policy – which purportedly would have allowed them to correct their deficiencies without incurring a penalty – induced them to delay filing their requests for hearing. By the time they learned that the policy had been unexpectedly changed, the time for appeal had passed. In rejecting their good cause argument, the Board observed that the petitioners knowingly decided not to request a hearing based on a series of assumptions similar to those Petitioner made in this case: 1) that the state survey agency would revisit the facility within the 60-day period to file a hearing request; 2) that the state survey agency would find that the facility had achieved substantial compliance; 3) that the finding of substantial compliance would be applied retroactively to a date prior to that revisit; and 4) that CMS would then not impose the designated penalty (denial of payment for new admissions). The Board noted that "if one of these assumptions proved false," petitioners would not have been able to complain about the purported policy change, their right to a hearing would have elapsed with the passing of 60 days, and the question of good cause for extending the filing deadline "would simply not arise."

Here, where Petitioner does not complain about any purported policy change, but relied on assumptions that ultimately proved false, its position is akin to that hypothetical position described by the Board in *Hammonds* where the question of good cause for extending the filing deadline "would simply not arise."

Similarly, in *Hillcrest*, DAB No. 1879 (2003), the petitioner argued that it had been attempting to resolve the dispute through the state's informal dispute resolution (IDR) and revisit processes. Further, it did not know "the full extent of imposed sanctions" and could not make an intelligent decision about waiving its hearing rights. The Board concluded that under any reasonable definition of "good cause," petitioner's election to resolve its dispute by other means and its deliberate decision to focus its resources on achieving compliance rather than challenging adverse survey findings did not excuse its failure to file a timely hearing request. *See also*, *Nursing Inn of Menlo Park*, DAB No. 1812 (2002) (provider must bear the consequences of its "conscious decision" to focus on its plan of correction and resurvey rather than to prepare an appeal.)

Thus, under any reasonable definition, Petitioner has not shown good cause for its failure to file a timely request for hearing.

***B. Petitioner has not challenged any of the findings from either the August 7, or October 24, 2008 surveys, and I have no authority to review the issues it raises in this appeal.***

Even if Petitioner had timely filed its hearing request, neither that request nor its Opposition Brief suggests any challenge to the August 7 or the October 24, 2008 survey findings. In claiming that CMS "erroneously determined that Oak Park was not in substantial compliance," Petitioner is plainly referring to a later survey, conducted January 20, 2009, which is not the subject of this appeal. According to the hearing request, the challenged survey "basically found three record-keeping errors related to three residents." Hearing Request, at 4.

> Substantial compliance does not require the unattainable standard of perfection. Here, although the three record-keeping errors are certainly regrettable, they do not rise to the level of posing risk of more than minimal harm, on an isolated basis. The survey's conclusion to the contrary, and CMS's resulting determination that Oak Park is not in "substantial compliance" are erroneous.

Hearing Request at 7. This does not describe the surveys here. The August 7, 2008 survey cited seventeen separate deficiencies, ranging in scope and severity from level D (isolated incident that caused no actual harm but with the potential for more than minimal harm) through level J (isolated incident that posed immediate jeopardy to resident health and safety). P. Ex. 2. The October 24, 2008 survey cited six deficiencies, at scope and severity levels D and E (pattern of noncompliance that caused no actual harm, but with the potential for more than minimal harm). P. Ex. 4.

Nowhere, in either the hearing request or Petitioner's opposition brief does Petitioner challenge any of the earlier survey findings. Rather, it argues that the facility would (or did) bring itself "back into substantial compliance before February 7, 2009." Hearing Request, at 6, 8 ("Oak Park contends that it achieved substantial compliance by the time of the third re-visit on January 20, 2009" and "Oak Park unquestionably will [have] achieved 'substantial compliance' by February 6, at the latest. . . .")

Petitioner raises some additional arguments questioning CMS's authority to terminate the facility's provider agreement. Hearing Request at 9-11. The regulations specifically authorize CMS to terminate a provider agreement in the absence of an immediate jeopardy finding and they mandate termination if the facility does not correct its deficiencies within six months. 42 C.F.R. §§ 488.412, 488.456. In any event, I have no authority to review CMS's choice of remedy. 42 C.F.R. § 488.408(g)(2).

Thus, Petitioner has not raised any issue that I have the authority to review, and, even if its hearing request had been timely filed, I would be compelled to dismiss. 42 C.F.R. § 498.70(b).

Finally, Petitioner cites *Carlton at the Lake*, DAB No. 1829 (2002), for the proposition that I may not dismiss based on the adequacy of its hearing request. However, this is not the situation presented in *Carlton at the Lake*, DAB No. 1829 (2002). There, the petitioner's hearing request did not meet the content requirements of 42 C.F.R. § 498.40(b) because it failed to identify the specific issues and findings of fact/conclusions of law with which petitioners disagreed, and failed to specify the bases for contending that those findings/conclusions were incorrect. Here, in contrast, Petitioner has filed a lengthy and detailed hearing request. But it does not raise an issue that I have the authority to review, plainly conceding the appealable issues: whether it was in substantial compliance with program requirements at the times of the August and October 2008 surveys. Moreover, in *Carlton*, the Board did not nullify the regulatory requirement for specificity; eventually a petitioner must disclose what it is complaining about. Here, Petitioner had an additional opportunity to identify the survey findings with which it disagrees. Like its hearing request, its opposition brief does not challenge any of the findings from the August or October surveys, but instead reiterates issues that I have no authority to resolve.

## III. Conclusion

Because Petitioner did not timely file its hearing request, and no good cause justifies extending the time for filing, I grant CMS's motion and order this case dismissed. 42 C.F.R. § 498.70(b). I note also, that even if the request had been timely, Petitioner raises no issue that I have the authority to review.

/s/
Carolyn Cozad Hughes
Administrative Law Judge