

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

South Shore Health & Rehabilitation,  
(CCN: 15-5330),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-13-118

ALJ Ruling No. 2013-13

Date: June 28, 2013

**ORDER OF DISMISSAL**

I grant the Centers for Medicare and Medicaid Services' (CMS) Motion to Dismiss Petitioner's request for hearing because Petitioner did not request an appeal of the deficiencies at issue within the required 60-day time frame, and Petitioner has presented no good cause for its late filing.

Petitioner is a skilled nursing facility in the State of Indiana. The Indiana State Department of Health (ISDH) conducted a complaint investigation survey of Petitioner's facility on March 17, 2012 and a revisit survey on August 3, 2012. CMS also conducted a federal monitoring survey on June 8, 2012. Surveyors found Petitioner not to be complying substantially with Medicare participation requirements at each of these surveys.

The applicable regulations at 42 C.F.R. Part 488 provide that a state or CMS may impose enforcement remedies against a long-term care facility if a state survey agency ascertains that the facility is not complying substantially with Medicare participation requirements. 42 C.F.R. §§ 488.406, 488.408, and 488.430. In this case, CMS acted to impose enforcement remedies based upon certain findings of deficiency after several surveys of Petitioner's facility revealed noncompliance with Medicare participation requirements.

## **The June 22, 2012 Notice Letter**

By notice letter dated June 22, 2012, CMS stated:

### **State Survey Results**

On March 17, 2012, a complaint investigation was completed . . . to determine if your facility was in compliance with the Federal requirements for nursing homes participating in the Medicare and Medicaid programs. This survey found that your facility was not in substantial compliance, with the most serious deficiency to place the health and safety of your patients in immediate jeopardy. This deficiency was cited as follows, including the scope and severity (S/S):

- F323 -- S/S: J -- 483.25(h) -- Free of Accident Hazards/supervision/ devices.

....

### **Federal Monitoring Survey**

Subsequently, a survey team . . . completed a Federal Monitoring Survey (FMS) of your facility on June 8, 2012. As the survey team informed you during the exit conference, the FMS has revealed that your facility continues to not be in substantial compliance. The FMS found deficiencies, with the most serious to place the health and safety of your patients in immediate jeopardy. These deficiencies were cited as follows, including the scope and severity (S/S):

- F225 -- S/S: L -- 483.13(c)(1)(ii)-(iii),(c)(2)-(4) -- Investigate/Report Allegations/Individuals
- F226 -- S/S: L -- 483.13(c) -- Develop/Implement Abuse/Neglect Policies

Federal Surveyors found situations of immediate jeopardy to patient health and safety that began May 19, 2012 and was removed and corrected on June 7, 2012.

....

CMS Ex. 5, at 1-2.

The June 22, 2012 notice letter then provided a summary of enforcement remedies as a result of the survey findings. CMS Ex. 5, at 3-5. The notice letter states “if you disagree

with the *finding of noncompliance which resulted in this imposition*, 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) . . . **A written request for a hearing must be filed no later than 60 days from receipt of this notice.** . . .” CMS Ex. 5, at 5-6 (boldfaced and underlined text in original, italicized text added to citation for emphasis). Petitioner did not file a written request for a hearing within 60 days of receipt of the June 22, 2012 notice letter.

### **The September 10, 2012 Notice Letter**

Subsequently, CMS sent Petitioner another notice letter describing findings of noncompliance made at an August 3, 2012 revisit survey. In its opening paragraph, the September 10, 2012 notice letter refers to the June 22, 2012 notice letter. CMS Ex. 7, at 1. Then, the notice letter describes the findings of noncompliance that were made at the August 3, 2012 revisit survey stating that:

[o]n August 3, 2012, the Indiana State Department of Health (ISDH) conducted revisits (health, complaint and Federal Monitoring Survey) to your facility, which revealed continued non-compliance with the most serious deficiencies at scope and severity (S/S) level D, cited as follows:

- F309 - - S/S: D - - 483.25 - - Provide Care/Services for Highest Well Being
- F325 - - S/S: D - - 483.25(i) - - Maintain Nutrition Status Unless Unavoidable
- F329 - - S/S: D - - 483.25(l) - - Drug Regimen is Free from Unnecessary Drugs
- F412 - - S/S: D - - 483.55(b) - - Routine/emergency dental services in NFs
- F441 - - S/S: D - - 483.65 - - Infection Control, Prevent Spread, Linens

CMS Ex. 7, at 1.

The September 10, 2012 notice letter then recited those remedies that CMS had previously determined to impose against Petitioner in the June 22, 2012 notice letter. CMS Ex. 7, at 2. The letter then advised Petitioner:

If you disagree with the *finding of noncompliance found during the August 3, 2012 standard health survey revisit and the Federal Monitoring Survey revisit which resulted in the continuation of previously imposed remedies*, 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) . . . **A written request for a hearing must be filed no later than 60 days from receipt of this notice.** . . .

CMS Ex. 7, at 3 (boldfaced and underlined text in original, italicized text added to citation for emphasis).

### **Petitioner's Hearing Request Was Not Timely Filed**

Petitioner filed a hearing request on November 7, 2012 stating that Petitioner “is appealing F323 (written at a s/s of J); F323 (written at a s/s of G); F325 (written at a s/s of L), and F226 (written at a s/s of L).” Petitioner then identified specific issues, findings of fact, and conclusions of law with which Petitioner disagreed. Petitioner’s hearing request explicitly challenges only certain findings of noncompliance that were first referenced in the June 22, 2012 notice letter. However, Petitioner’s hearing request refers to the September 10, 2012 notice letter and attaches that letter. *See* Hearing Request. Petitioner states it is “timely appealing from a disposition of remedies letter.”

On December 17, 2012, CMS filed a Motion to Dismiss arguing that Petitioner missed the 60-day August 24, 2012 deadline to file a written request for a hearing challenging the noncompliance findings in the June 22, 2012 notice letter by more than two months, and Petitioner has not presented good cause for its late filing. CMS proposed eight exhibits identified as CMS Ex. 1 – CMS Ex. 8. Petitioner did not respond to CMS’s Motion to Dismiss.

The June 22, 2012 notice letter to Petitioner was unambiguous in that it recited the findings of the March 17, 2012 state complaint survey and June 8, 2012 federal monitoring survey as a basis to support the enforcement remedies which CMS had determined to impose. Petitioner, if it wanted to challenge the findings detailed in this notice letter, was required to file a hearing request in which Petitioner identified the deficiencies it was challenging and stated the basis for its challenge within 60 days of receipt of CMS’s notice. 42 C.F.R. § 498.40(b)(1), (2); *Cary Health & Rehab. Ctr.*, DAB 1771, at 7-20 (2001) (upholding dismissal of a hearing request filed beyond the 60-day time period stated in the initial notice letter imposing enforcement remedies). However, Petitioner did not file a written request for a hearing referencing the deficiency findings in the June 22, 2012 notice letter until November 7, 2012, well after the 60-day period had expired.

The 60-day time period may be extended in the case of an untimely filing, but only on a showing of good cause for a failure to file timely. 42 C.F.R. § 498.40(c)(2). Petitioner did not request an extension of the time for filing a request for hearing and did not offer any explanation for its untimely filing in Petitioner’s November 7, 2012 hearing request pursuant to 42 C.F.R. § 498.40(c)(1). Additionally, Petitioner did not respond to the

