Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Rutland Nursing Home,
(CCN: 33-5537),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-272

Ruling No. 2014-12

Date: November 8, 2013

ORDER OF DISMISSAL

For the reasons set forth below, I dismiss as untimely the hearing request filed by Petitioner, Rutland Nursing Home.

I. Background

Petitioner is a long-term care facility located in Brooklyn, New York, and participates in the Medicare program. Based on a survey completed on February 23, 2012, the Centers for Medicare & Medicaid Services (CMS) notified Petitioner, by letter dated April 13, 2012, that it was not in substantial compliance with Medicare participation requirements and that CMS was imposing a denial of payment for new admissions (DPNA), beginning April 28, 2012, and continuing until the facility returned to substantial compliance. The notice letter also informed Petitioner that if it disagreed with CMS's determination, it could request a hearing before an administrative law judge (ALJ) within 60 days of its receipt of CMS's notice letter. CMS Exhibit (CMS Ex.) 3.

By letter dated December 20, 2012, Petitioner filed a request for hearing (RFH). Petitioner concedes that it failed to request a hearing within 60 days of receipt of the April 13, 2012 letter. Petitioner argues, however, that CMS issued a subsequent "initial determination" when CMS decided not to follow the recommendations of the state Internal Dispute Resolution (IDR) body. In the alternative, Petitioner argues that good cause exists to extend the time for filing.

The hearing request and request was docketed, and the case was assigned to me. On February 19, 2013, CMS filed a motion to dismiss because Petitioner's hearing request was untimely filed and no good cause exists to extend the time for filing (CMS Br.).[1] CMS filed four exhibits with its motion (CMS Exs. 1-4). Petitioner filed a response (P. Br.) on March 20, 2013, accompanied by eight exhibits marked as P. Exs. A-H. CMS then submitted a reply brief on March 26, 2013. In the absence of objection, I admit CMS Exs. 1-4 and P. Exs. A-H into the record.

II. General Authority

Section 1866(h) of the Social Security Act (Act) (42 U.S.C. § 1395cc(h)) authorizes administrative review of determinations that a provider has failed to comply substantially with Medicare program requirements "to the same extent as is provided in section 205(b) [of the Act]." The Secretary of Health and Human Services must provide 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 the affected party receives notice of CMS's determination. Act § 205(b), 42 U.S.C. § 405(b) (emphasis added).

Similarly, the applicable regulations mandate that an 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)(2). On motion of a party, or on his or her own motion, an ALJ may dismiss a hearing request that was not timely filed if the time for filing was not extended. 42 C.F.R. § 498.70(c). Receipt of the notice 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." 42 C.F.R. §§ 498.40(a)(2); 498.22(b)(3). The affected party may file a written request for an extension of the 60-day period, stating the reason why the hearing request was not timely filed. For good cause shown, an ALJ may extend the time for filing the hearing request. 42 C.F.R. § 498.40(c).

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[1] CMS initially filed a motion to dismiss pursuant to 42 C.F.R. § 498.70(b) and (c) on February 14, 2013. However, on February 19, 2013, CMS filed an amended motion adding another basis for dismissal.

If a facility is successful during an IDR proceeding at demonstrating that the deficiencies should not have been cited, they are removed from the statement of deficiencies (SOD) and any enforcement action imposed solely as a result of those deficiencies is rescinded. 42 C.F.R. § 488.331(c). However, failure of the state or CMS to complete IDR timely cannot delay the effective date of any enforcement action against the facility, and a facility may not seek a delay of such action on the ground that IDR was not completed before the effective date of the enforcement action. 42 C.F.R. § 488.331(b).

III. Issue

The issue in this case is whether:

> There is good cause to extend the time period for Petitioner to file a hearing request.

IV. Findings

> ***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.***

Petitioner concedes that it did not file a timely hearing request but argues that good cause exists to extend its time for filing.

The New York State Department of Health (NYSDOH or state agency) conducted a recertification survey of Petitioner's facility on February 23, 2012. The state agency determined that Petitioner was not in compliance with nineteen separate Medicare requirements. CMS Ex. 2. Based on the state agency's findings, CMS notified Petitioner by letter dated April 13, 2012, that it would impose a DPNA effective April 28, 2012, and it would continue until the facility returned to substantial compliance. CMS Ex. 3. The letter notified Petitioner that it could request a hearing before an ALJ, citing 42 C.F.R. §§ 498.40 *et seq.* as the regulations governing this process. The letter further stated that a written request for a hearing must be filed no later than 60 days from the date of receipt of the letter. CMS faxed the notice to Petitioner on April 13, 2012, and Petitioner does not dispute receiving it on the same date. Accordingly, Petitioner was required to file its request for hearing within 60 days of April 13, 2012, or by June 12, 2012.

On April 27, 2012, Petitioner requested IDR from the NYSDOH, citing 42 C.F.R. § 488.331, regarding one of the deficiencies cited (F-325). RFH Attachment Ex. A. The June 12, 2012 deadline for requesting a hearing under 42 C.F.R. § 498.40 passed without Petitioner filing a request for an ALJ hearing. According to Petitioner, on or about October 18, 2012, one of Petitioner's representatives spoke with a representative from the NYSDOH regarding the IDR proceeding. During that conversation, the NYSDOH representative informed Petitioner "that the NYSDOH had recommended to [CMS] that

Rutland's F 325 Nutritional Status deficiency . . . be reduced to a scope and severity level D citation." P. Br. at 2; P. Ex. A. By letter dated October 23, 2012, the NYSDOH notified Petitioner of the results of the IDR review. The IDR panel concluded that the scope and severity level of "G" cited for Petitioner's challenged citation (F-325), would remain unchanged. P. Ex. B. Subsequently, on December 20, 2012, or 251 days after its receipt of the April 13, 2012 CMS notice, Petitioner filed a request for an ALJ hearing.

Petitioner concedes that it filed the request for hearing more than 60 days after the CMS initial determination contained in its April 13, 2012 letter, but argues that CMS issued a "subsequent initial determination" when CMS decided not to follow the recommendations of the state IDR body. It is Petitioner's position that the CMS decision not to accept the NYSDOH IDR panel's recommendation constituted an initial determination, triggering a new 60-day appeal period. Accordingly, Petitioner argues that it had 60 days from the October 23, 2012, NYSDOH letter following the IDR process, or until December 22, 2012, to file its request for ALJ hearing.

Section 498.3(b) of 42 C.F.R. sets forth a range of actions that constitute "initial determinations by CMS." Subsection 498.3(b)(13) provides that "a finding of noncompliance that results in the imposition of a remedy specified in 42 C.F.R. § 488.406" is an initial determination. The NYSDOH letter informing Petitioner of the IDR results is not an initial determination by CMS, and thus it does not trigger any appeal rights under 42 C.F.R. Part 498. The regulations provide that a provider may appeal only an initial determination of CMS. The IDR result from NYSDOH is not an administrative action by CMS that may be appealed to an ALJ. *See* 42 C.F.R. §§ 498.3(b)(13), 498.3(d), 498.40(a); *Capitol House Nursing & Rehab Ctr.*, DAB No. 2252, at 4-5 (2009); *High Tech Home Health, Inc.*, DAB No. 2105, at 7-8 (2007), *aff'd*, *High Tech Home Health, Inc. v. Leavitt,* Civ. No. 07-80940 (S.D. Fla. Aug. 15, 2008).

In the alternative, Petitioner makes a number of arguments that good cause exists to extend the time for filing. Petitioner argues that the IDR panel's delay in issuing its recommendation prevented Petitioner from learning of the IDR "negative conclusion," and therefore it was not able to timely file an ALJ request for hearing. Further, Petitioner argues that CMS's determination to reject the NYSDOH IDR panel's recommendation was arbitrary and capricious.

As Petitioner notes, the regulations do not define "good cause" but leave that determination to the discretion of the ALJ. 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 Ctr., et al*, DAB CR913 (2002), *aff'd*, DAB No. 1853 (2002); *Glen Rose Medical Ctr.*, DAB CR918 (2002), *aff'd*, DAB No. 1852 (2002); *Parkview Care Ctr.*, DAB CR785 (2001); *Hospicio San Martin*, DAB CR387 (1995), *aff'd*, DAB No. 1554 (1996); 20 C.F.R. §§ 404.911, 404.933(c). The Departmental Appeals Board (Board) has never reached the issue of

whether "good cause" is limited to circumstances beyond a party's ability to control. *Hammonds Lane Ctr., et al.*, DAB No. 1853, at n.3; *Wellington Oaks Care Ctr.*, 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. *Hammonds Lane Ctr.*, DAB No. 1853, at 1; *Hillcrest Healthcare, L.L.C.* DAB No. 1879 (2003).

In *Hillcrest*, DAB No. 1879 (2003), the petitioner argued that it had been attempting to resolve the dispute through the state's IDR and revisit processes. Further, it argued 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," the 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.)

The state IDR process is entirely separate from the ALJ appeals process, which is a de novo review. I note, however, that CMS maintains authority to accept or reject state recommendations following IDR proceedings. *Britthaven of Chapel Hill*, DAB No. 2284 (2009). The formal ALJ appeal and informal IDR processes are distinct proceedings that can occur simultaneously and are not interdependent. The Board has long held that pursuit of IDR does not toll or stay the time period for requesting a hearing and that engaging in IDR does not excuse a failure to timely file or constitute good cause for making an untimely filing. The Board has pointed out that a state IDR process is separate from and in addition to appeal rights provided to a facility under federal regulations, that requesting both IDR and a hearing at the same time are not mutually exclusive, and that a petitioner could not reasonably conclude that participation in IDR would somehow toll the federal appeals process. *Quality Total Care, L.L.C., d/b/a The Crossings*, DAB No. 2242, at 10 (2009) (*citing Concourse Nursing Home*, DAB No. 1856 (2002), *aff'd, Concourse Rehab. & Nursing Ctr., Inc. v. Thompson*, No. 03 Civ. 260 (NRB) (S.D.N.Y Mar. 8, 2004), 2004 WL 434434, *aff'd*, 155 Fed. App'x 28, No 04-2586-CV, 2005 WL 3076899 (2d Cir. Nov. 17, 2005)); *Hillcrest Healthcare, L.L.C.*, DAB No. 1879; *Royal Suites*, DAB CR2585, at 5 (2012). Moreover, participation in the IDR process, even if prolonged, does not establish good cause or toll the applicable appeal period for seeking an ALJ hearing. *Nursing Inn of Menlo Park*, DAB No. 1812, at 3-5.

Petitioner also argues that the CMS notice lacked clarity in delineating its appeal rights, and I should accordingly find good cause for the delayed request for hearing. However, the letter explicitly states that: "[a] written request for a hearing must be filed no later than 60 days from the date of receipt of this letter." CMS Ex. 3, at 2. The letter also provides the citation to the regulations governing the appeals process. I find the CMS letter is clear and unambiguous.

Petitioner further argues that the question of whether there is good cause turns on material facts that are in dispute, and to support its position, seeks that I grant its request for a subpoena duces tecum. Accordingly, Petitioner argues that a determination on whether there is good cause is premature. P. Br. at 13-14. Petitioner requests that I require CMS to produce correspondence between NYSDOH IDR and CMS regarding the IDR recommendation and the CMS determination. Petitioner argues that these documents prove that the IDR panel recommended that CMS reduce the scope and severity of the challenged deficiency. However, as explained above, I find any state IDR recommendation, or CMS's rejection of it, non-interdependent and not relevant to the issue of the timeliness of Petitioner's hearing request.

Here the regulatory timeframe to file a hearing request is clear and detailed in the CMS April 2012 letter. Petitioner failed to meet the deadline and has failed to show good cause, so its hearing request must be dismissed under 42 C.F.R. § 498.70(c).[2]

V. Conclusion

For the reasons discussed above, I deny Petitioner's request for a subpoena duces tecum, and I dismiss Petitioner's hearing request, pursuant to 42 C.F.R. § 498.70(c), because it was not timely filed. I further deny Petitioner's request for an extension of time to file that hearing request, as no good cause justifies extending the time. Petitioner did not timely take advantage of the opportunity to request a hearing, of which it was clearly notified in CMS's April 13, 2012 notice letter.

/s/
Joseph Grow
Administrative Law Judge

[2] Because I dismiss this case as untimely pursuant to 42 C.F.R. § 498.70(c), I need not address the CMS motion to dismiss raised under section 498.70(b).