

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Prescott View Country Nursing Home,
(CCN: 175519),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-917

ALJ Ruling No. 2017-23

Date: August 18, 2017

**RULING DENYING REQUEST FOR EXTENSION
AND DISMISSING CASE**

On July 14, 2017, Petitioner, through counsel, made a “Request for Extension of Time” (Extension Request). I acknowledged receipt of the Extension Request in an order dated July 25, 2017. In my order, I reserved ruling on the request to allow the Centers for Medicare & Medicaid Services (CMS) an opportunity to respond to it. On August 3, 2017, CMS filed its “Objection to Petitioner’s Request for Extension of time to File Hearing Request” (CMS Obj.) with two exhibits, labeled CMS Ex. 1 and CMS Ex. 2. Petitioner filed a response to CMS’s objection (P. Resp.) on August 10, 2017. For the reasons explained below, I sustain CMS’s Objection, deny Petitioner’s Extension Request, and order that this case¹ be dismissed.

¹ My office docketed this case as it would a hearing request even though Petitioner filed only its Extension Request and did not append the hearing request that it sought to file out of time.

Discussion

***Because Petitioner failed to request a hearing timely and there is no good cause to grant an extension of the deadline, this matter must be dismissed.*²**

As a skilled nursing facility participating in Medicare, Petitioner may request a hearing before an administrative law judge to challenge “a certification of noncompliance leading to an enforcement remedy” by CMS or its agent. 42 C.F.R. § 488.408(g)(1); *see also id.* §§ 488.330(e), 498.3(b)(13), 498.40(a). However, to avail itself of the opportunity for a hearing, an affected party must “file the request in writing within 60 days from receipt of the notice . . . unless that period is extended in accordance with paragraph (c) of this section.” *Id.* § 498.40(a)(2). In turn, 42 C.F.R. § 498.40(c)(2) provides: “For good cause shown, the ALJ may extend the time for filing the request for hearing.” On the other hand, I may dismiss a hearing request where “[t]he affected party did not file a hearing request timely and the time for filing has not been extended.” *Id.* § 498.70(c).

In a letter dated April 19, 2017 (April 19 notice letter), CMS informed Petitioner that it was imposing per day civil money penalties (CMPs) beginning on March 16, 2017, and continuing until the facility achieved substantial compliance with participation requirements. CMS Ex. 1 at 1. The April 19 notice letter further informed Petitioner that if it disagreed with CMS’s determination, it “may request a hearing before an administrative law judge of the Department of Health and Human Services, Departmental Appeals Board (DAB).” CMS Ex. 1 at 2. The letter went on to state that Petitioner “must file [its] hearing request . . . no later than sixty (60) days after receiving this letter.” *Id.*

In its Extension Request, Petitioner does not dispute that it received the April 19 notice letter. However, Petitioner does not indicate the date on which it received the letter. Therefore, I presume Petitioner received the April 19 notice letter five days after mailing, or April 24, 2017. *See* 42 C.F.R. § 498.40(a)(2), 498.22(b)(3). Calculating 60 days from this presumed date of receipt, Petitioner’s time for requesting a hearing to challenge the April 19 notice letter expired on June 23, 2017. Petitioner filed its Extension Request on July 14, 2017, 21 days beyond the expiration of the deadline. In any event, Petitioner’s Extension Request implicitly acknowledges that Petitioner did not timely file a hearing request to challenge the CMPs imposed in the April 19 notice letter.

Petitioner argues that there is good cause to grant its Extension Request because it “mistakenly understood that the time to request a hearing for the March CMPs was altered” by its receipt of a subsequent notice from CMS. Extension Request. With its Extension Request, Petitioner submitted copies of four additional letters from CMS, three

² I make this one finding of fact/conclusion of law.

of which are dated June 26, 2017, and one of which is dated June 21, 2017.³ In particular, the June 21, 2017 letter (June 21 notice letter) informed Petitioner that CMS was imposing additional CMPs beginning May 15, 2017. P. Ex. 1 at 5. The June 21 notice letter also informed Petitioner of its right to request a hearing within 60 days if it disagreed with the remedies imposed in that letter.⁴ P. Ex. 1 at 6. The separate receipt of the April 19 and June 21 notice letters appears to be the basis for Petitioner's asserted confusion as to the deadline to file its hearing requests. Petitioner asserts it was confused by the separate notices it received from CMS because the notices referred generally to CMPs, referenced the same CMS Certification Number (CCN), and gave different deadlines for requesting a hearing to challenge the CMPs. P. Resp. at 1-2.

CMS argues that this explanation fails to establish good cause for Petitioner's failure to file a timely hearing request and urges me to reject it. CMS Obj. at 1. I agree that Petitioner has not shown good cause for its failure to file a timely hearing request.

Neither the regulations themselves, nor appellate decisions of the Departmental Appeals Board (DAB) provide an authoritative or complete definition of "good cause" for a party's failure to meet a deadline or other regulatory requirement, but leave that determination to the discretion of the administrative law judge. *See, e.g., Brookside Rehab. & Care Ctr.*, DAB No. 2094 at 7 & n.7 (2007); *Glen Rose Med. Ctr. Nursing Ctr.*, DAB No. 1852 at 7 n.5. In that regard, many decisions of DAB administrative law judges have concluded that good cause is not established where the untimely filing was the result of avoidable human error. *See, e.g., Heritage Park Rehab. & Nursing Ctr.*, DAB CR2028 at 4 (2009); *Jackson Manor Health Care, Inc.*, DAB CR545 at 6-7 (1998).

In the present case, even if Petitioner was, in fact, "confused" by the correspondence it received from CMS, Petitioner's confusion was not reasonable; moreover, confusion represents avoidable error and thus is not good cause. First, Petitioner could not reasonably have suffered confusion regarding its right to request a hearing based on the April 19 notice letter. The letter explicitly states, consistent with the regulations cited above, that Petitioner "must file [its] hearing request . . . no later than sixty (60) days after receiving this letter." CMS Ex. 1 at 2. This language is unambiguous on its face. Furthermore, the April 19 and June 21 notice letters refer to *completely different instances of noncompliance* forming the basis for the imposed CMPs. *Compare* P. Ex. 1 at 5 ("[W]e are imposing a civil money penalty (CMP) . . . for the deficiencies cited at tags: F0223 . . . and F0225 . . .") *with* CMS Ex. 1 at 1 ("[W]e are imposing a per day

³ For purposes of this order, I refer to the attachment to Petitioner's Extension Request as P. Ex. 1. The documents appear as item 1a in the electronic file for this case.

⁴ Petitioner timely requested a hearing regarding the remedies imposed in the June 21 notice letter. That hearing request is currently pending before me under Docket Number C-17-913.

civil money penalty (CMP) . . . for the deficiency cited at tag: F0323 . . .”). Finally, no reasonable facility in Petitioner’s position would be confused by the use of the same CCN on various letters from CMS. Specifically, the fact that the same CCN appeared on two separate notice letters does not support an inference that the letters referred to the same enforcement actions or remedies. That is because the CCN identifies the facility, not the enforcement action.⁵ Thus, the same CCN would naturally appear on any CMS correspondence directed to the facility. For all these reasons, Petitioner’s claimed “confusion” appears to be no more than an after-the-fact rationalization for its failure to file timely.

Petitioner further notes that it “did not seek legal advice as to the conflict between the two deadlines.” P. Resp. at 2. However, Petitioner’s failure to consult an attorney to advise it on exercising its right to a hearing under the regulations is not good cause for late filing. Petitioner’s choice to seek, or not to seek, legal representation was at all times a decision within its control. *Cf. Heritage Park*, DAB CR2028 at 4 (failure of counsel to file timely was not beyond facility’s control because facility could choose whether to represent itself or to be represented by counsel; it chose its attorney; and it could exercise oversight of its attorney). Moreover, at the time it received the April 19 notice letter, Petitioner could not have known that it would receive a second letter at a later date imposing additional remedies; and at least 58 days had already elapsed by the time CMS issued the June 21 notice letter. Thus, if Petitioner intended to challenge the remedies imposed in the April 19 notice letter, it would have needed to begin preparing a hearing request on its own behalf or to have retained an attorney to do so before it received the June 21 notice letter. Petitioner’s failure to take either action, whether negligent or intentional, is not good cause for late filing. *See Jackson Manor Health Care*, DAB CR545 at 7 (corporation may not assert good cause premised on the avoidable failure of one of its employees to discharge a duty).

Similarly, Petitioner’s assertion that its Extension Request is “in no way meant to prejudice CMS” is not good cause for granting an extension. This assertion, in essence, represents an appeal to equity – i.e., Petitioner will suffer harm (loss of its opportunity for a hearing) in the absence of the relief sought, while CMS will not. Even if it were true that CMS would suffer no harm if I granted Petitioner’s request for an extension,⁶ the lack of harm to CMS does not establish good cause for Petitioner’s failure to file timely.

⁵ According to the State Operations Manual (SOM), “CMS data systems use the CCN to identify each individual provider or supplier that has or currently does participate in Medicare and/or Medicaid.” SOM, CMS Pub. 100-07, Ch. 2, § 2779A (available online at <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html> (last visited August 15, 2017)).

⁶ I do not draw this conclusion, as it is at least arguable that CMS may suffer harm, in the form of additional litigation costs, should I grant Petitioner’s requested extension.

I am “bound by applicable laws and regulations.” *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009). Nothing in the language of 42 C.F.R. § 498.40(c)(2) suggests that the absence of harm to CMS is a basis to extend the deadline to file a hearing request. To the contrary, to determine whether there is good cause for late filing, I must examine the facts and circumstances that prevailed when the filing deadline passed and when the extension request was filed. Thus, the good cause analysis is, essentially, backward-looking. By contrast, any analysis balancing the potential harm that may occur to the parties is inherently forward-looking. That is, I must infer what is likely to happen *after* I rule for one party or the other. Such an analysis is irrelevant to the question of whether there was good cause for late filing within the meaning of 42 C.F.R. § 498.40(c)(2). *See NBM Healthcare, Inc.*, DAB No. 2477 at 5 (2012) (facility’s argument that it had established procedures to prevent it missing any future deadlines was “simply not relevant to the issue of whether good cause existed”).

For the foregoing reasons, I conclude that Petitioner has not established good cause to file a hearing request out of time. Furthermore, Petitioner did not file a hearing request within 60 days after it received the April 19, 2017 notice letter as required by 42 C.F.R. § 498.40(a)(2). I therefore deny Petitioner’s request for an extension of time to file its hearing request and dismiss this case. *See* 42 C.F.R. §§ 498.40(c)(2), 498.70(c).

/s/

Leslie A. Weyn
Administrative Law Judge