Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Waterfront Terrace,	)	Date: February 24, 2010
(CCN: 14-5939),	)	
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-746
	)	Decision No. CR2076
Centers for Medicare & Medicaid	)	
Services.	)	
	)	

DECISION

For the reasons set forth below, I dismiss as untimely the hearing request filed by Petitioner, Waterfront Terrace (Petitioner or facility).

I. Background

The following facts are not in dispute:

Petitioner is a skilled nursing facility located in Chicago, Illinois, that participates in the Medicare program as a provider of services. Based on surveys (health and Life Safety Code) completed January 29, 2009, the Illinois Department of Public Health (state agency) determined that the facility was not in substantial compliance with Medicare participation requirements. *See*, CMS Exs. 1-3, 5. In a notice letter dated April 15, 2009, the state agency advised Petitioner that the Centers for Medicare & Medicaid Services (CMS) was therefore imposing a denial of payment for new admissions (DPNA), effective May 4, 2009. In addition, the letter warned that the state agency would recommend termination of the facility's provider agreement if it did not achieve substantial compliance by July 29, 2009. CMS Ex. 3.

A section of the notice letter prominently captioned "**Formal Appeal Rights**" advised Petitioner of its right "to contest determinations of non-compliance with Medicare regulations that result in imposed remedies," citing the regulations that govern such appeals – 42 C.F.R. § 498.40 *et seq*. The letter then said that

> [i]n order to be granted a hearing for the Category 1 or 2 remedies[1] imposed in this notice, the facility must file a written request for a hearing within 60 days from the receipt of this notice.

CMS Ex. 3 at 1. The letter told Petitioner where to send its hearing request and explained that such a request "must" identify the specific issues and the findings of fact and conclusions of law with which the facility disagrees, and specify the basis for contending that CMS's findings and conclusions are incorrect. CMS Ex. 3.

The state agency sent the notice letter by certified mail, and CMS submits a return receipt showing that the facility received the letter on April 20, 2009. CMS Ex. 4.

Petitioner did not request a hearing within 60 days of receiving the notice.

In a letter dated July 14, 2009, CMS advised the facility that its Medicare provider agreement would terminate effective July 29, 2009, because, based on surveys completed January 29, March 5, July 2, and July 8, 2009, the facility did not attain substantial compliance with participation requirements. CMS Ex. 5. The notice letter advised Petitioner of its right to appeal the noncompliance findings that resulted in the imposition of that remedy (termination). CMS Ex. 5, at 4.[2]

The letter also reminded the facility that the state agency had already imposed a DPNA, and had "previously advised of your right to appeal the noncompliance that resulted in" the agency's imposing the DPNA. CMS referred Petitioner to the state agency's April

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[1] DPNA is a category 2 remedy. 42 C.F.R. § 488.408(d). Termination is a category 3 remedy. 42 C.F.R. § 488.408(e).

[2] CMS subsequently determined that the facility achieved substantial compliance on July 9, 2009. In a letter dated August 6, 2009, it advised Petitioner that it rescinded the termination and discontinued the DPNA effective July 9, 2009. CMS Ex. 6. Because the termination was rescinded, Petitioner is not entitled to a hearing on the findings that resulted in the imposition of that remedy. 42 C.F.R. § 498.3(d)(10)(ii); *Fountain Lake Health & Rehabilitation*, DAB No. 1985 (2005); *Schowalter Villa*, DAB No. 1688 (1999).

15, 2009 notice, instructing it to "note the deadline for that appeal. As of this date, we have not received a request for a hearing." CMS Ex. 5, at 4.

In a letter dated and mailed September 14, 2009, Petitioner refers to the July 14, 2009 notice, but then requests a hearing on the imposition of the DPNA. CMS Ex. 7.

CMS moves to dismiss the request as untimely.[3]

II. Discussion

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.[4]

Section 1866(h) of the Social Security Act (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 "[u]pon 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/her own motion, the 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).

By regulation, CMS may authorize the state agency to give a provider notice of: 1) its noncompliance; 2) the remedy imposed and its effective date; and 3) the provider's "[r]ight to appeal the determination leading to the remedy." 42 C.F.R. § 488.402(f). Consistent with this authority, the state agency here sent the April 15, 2009 notice letter, which informed Petitioner that it was not in substantial compliance, that a penalty (DPNA) was imposed, and that Petitioner could appeal the determination of

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[3] CMS accompanies its motion and brief with seven exhibits (CMS Exs. 1-7). With its brief in opposition, Petitioner submits two exhibits (P. Exs. 1-2), which duplicate CMS Exs. 3 and 5.

[4] I make this one finding of fact/conclusion of law.

noncompliance that led to the DPNA, but that its written request for hearing had to be filed within 60 days of its receiving the notice letter. Petitioner unquestionably received the notice letter on April 20, 2009, so to challenge the survey findings that led to the DPNA, Petitioner's hearing request had to be filed no later than *June 19, 2009*.

Petitioner's September 14, 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 argues that the April 15, 2009 notice letter was defective because, although it identified termination as a category 3 remedy, it did not say specifically that a DPNA was either category 1 or category 2. Petitioner characterizes the notice as "the most circuitous language imaginable," and claims that no lay person could reasonably have been expected to understand it.[5] P. Br. at 3. I disagree.

The April 15 notice letter explicitly says that the facility may contest determinations of noncompliance that result in remedies being imposed – precisely Petitioner's situation – and cites the governing regulations. Then the letter tells the facility how to request a hearing and includes the critical language that the facility "must file a written request for a hearing within 60 days from the receipt of this notice." Thus, any reasonable person – even a "lay person" – receiving this notice would know that the state was imposing a DPNA based on its findings of noncompliance, and that the provider could appeal those findings if it filed a written request within 60 days. *See*, *Cary Health and Rehabilitation Center*, at 13 (where notice accurately sets out the timing and nature of the facility's appeal rights, the ALJ properly dismissed an untimely hearing request).

That the letter refers to category 1 and 2 remedies, without explicitly identifying a DPNA as a category 2 remedy, does not detract from the notice letter's explicit instructions. Nor do I fault the state agency for identifying termination as a category 3 remedy. In so doing, it clarified that an appeal responding to this particular notice would not include review of the findings that resulted in termination (if, in fact, the facility were ultimately terminated).

I note also that Petitioner suggests no other possible interpretation, and provides no declaration or other evidence claiming that it had any alternative understanding of the notice. If, in fact, Petitioner were genuinely confused, it should have sought clarification,

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[5] I note also that Petitioner is not merely a "lay person," but a Medicare-certified provider of services, which should be expected to possess at least a rudimentary understanding of program rules and terminology. *See*, *Heckler v. Cmty. Health Services of Crawford County*, 467 U.S. 51, 63 (1984) (Those who deal with the government are expected to know the law.)

as instructed in the notice letter. CMS Ex. 3, at 2 (providing contact information "[i]f you have any questions concerning this letter"); *Cary Health and Rehabilitation Center*, at 27 (A notice letter that spells out appeal rights alerted the facility that "some appealable action had been taken." If the recipient is unsure of its significance, he should at least seek clarification).

Petitioner also complains that the July 14, 2009 notice letter "added to the confusion." Inasmuch as the deadline for filing had long since passed by the time Petitioner received the July 14 notice letter, it could not possibly have affected the facility's decision about responding to the April 15 notice. So, even if I agreed that the letter was confusing (which I do not), that finding would be wholly irrelevant.

III. Conclusion

Because Petitioner did not file its hearing request within 60 days of receiving the April 15, 2009 notice letter, and no good cause justifies my extending the time for filing, I dismiss its request. 42 C.F.R. § 498.70(c).

/s/
Carolyn Cozad Hughes
Administrative Law Judge