

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Vista Surgical Center, Inc.,  
(CCN: 05C0001266),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-130

Decision No. CR2324

Date: February 15, 2011

**DECISION DISMISSING  
REQUEST FOR HEARING**

I dismiss the hearing request of Petitioner, Vista Surgical Center, Inc., because Petitioner failed to establish good cause for its untimely hearing request.

**I. Background**

Petitioner is an ambulatory surgical center in Orange, California, and it participated in the Medicare program. On September 29, 2010, the Centers for Medicare and Medicaid Services (CMS) notified Petitioner that it was terminating Petitioner's participation in Medicare, based on findings that Petitioner had failed to comply with Medicare participation requirements. On December 3, 2010, Petitioner filed a request for a hearing, and the case was assigned to me for a hearing and a decision.

CMS moved to dismiss Petitioner's hearing request. It filed five proposed exhibits with its motion, which I am receiving into the record as CMS Exhibit (Ex.) 1 – CMS Ex. 5. Petitioner opposed the motion, and it filed two proposed exhibits, which I am receiving as

P. Ex. A and P. Ex. B. Petitioner's counsel, Lawrence Hoodack, also filed a declaration on behalf of Petitioner. I am identifying and receiving this document as P. Ex. C.

## **II. Issue, Findings of Fact, and Conclusions of Law**

### **A. Issue**

The issue in this case is whether Petitioner has established good cause for filing an untimely hearing request.

### **B. Findings of Fact and Conclusions of Law**

Petitioner's right to a hearing in this case is governed by regulations at 42 C.F.R. Part 498. A party desiring a hearing pursuant to the Part 498 regulations must request one within 60 days from the date of receipt from CMS of an adverse determination. 42 C.F.R. § 498.40(a)(2). The date of receipt will be presumed to be five days from the mailing date of the notice, "unless there is a showing that it was, in fact, received earlier or later." 42 C.F.R. § 498.22(b)(3). Thus, the five-day presumptive date of receipt does not apply where the date of actual receipt of the notice is established. A party who files a request untimely is not entitled to a hearing, unless it can show good cause for its untimely filing.

The undisputed facts of this case are that CMS sent its notice of adverse determination to Petitioner on September 29, 2010. CMS Ex. 3; CMS Ex. 4 at 2. CMS sent the notice to Petitioner via FedEx. CMS Ex. 4 at 3. The notice was delivered by FedEx to Petitioner's address on September 30, 2010. *Id.* The actual date of delivery of CMS's notice to Petitioner is, therefore, September 30, 2010, and Petitioner had 60 days from that date, or until November 29, 2010, to file its hearing request.

Petitioner did not file a hearing request until December 3, 2010. Its hearing request is untimely, inasmuch as it was filed four days after the expiration of the 60-day filing period.

Petitioner did not establish good cause for failing to file its request timely. The term "good cause" is not defined by regulations, but it has been held universally to mean a circumstance that is beyond an individual's or entity's ability to control that prevented the individual or entity from timely filing a hearing request. Petitioner has offered no explanation for its untimely filing and has pointed to no circumstance that served to prevent it from filing a hearing request within the 60 day period permitted by the regulation.

Petitioner makes several arguments, all of which I find to be without merit. First, it contends that CMS's September 29, 2010 notice was not sent to Petitioner via overnight

delivery. That is simply incorrect. CMS established that the notice was sent to Petitioner overnight via FedEx and that it was delivered on September 30, 2010.

Second, Petitioner appears to argue that CMS cannot show that the notice actually was delivered to its owner, Lora Altis, at any time before the expiration of the five-day presumptive period. Thus, according to Petitioner, it should have the benefit of the five day presumption, and its hearing request actually was filed timely. I find this argument to be without merit because CMS proved that that notice was delivered on September 30, 2010 to Petitioner's facility.

There is no requirement in the regulations that a notice be delivered to a specific individual – a registered agent or to an officer or director of an entity, for example – for delivery to be accomplished. The regulations require that notice of an adverse determination be sent to an “affected party.” 42 C.F.R. § 498.20(a)(1). An “affected party” is the party that is subject to CMS's determination. In this case, the affected party is Petitioner. Consequently, CMS's obligation to provide notice was to send the notice to Petitioner at its address. Delivery of that notice triggered the 60-day period within which Petitioner was entitled to request a hearing.

I note, moreover, that Petitioner does not deny that its owner, Lora Altis, actually saw the notice on the date that it was delivered to Petitioner. Ms. Altis has not averred that she received the notice after September 30. Petitioner contends only that there is “no showing” that she personally saw it on September 30.

Petitioner's counsel argues that, when he received a copy of the notice from his client, he reviewed it and saw no indication on the document that it had been sent to Petitioner overnight via FedEx. P. Ex. C. He contends that his research led him to conclude that he had 65 days from September 29, 2010 to file a hearing request and that he relied on his research to conclude that he was filing the request timely on Petitioner's behalf by filing it on December 3, 2010. *Id.* According to counsel, he inquired of FedEx and learned that some forms of FedEx shipment involve second or third day delivery.

I find this argument to be unpersuasive. Petitioner's counsel could easily have ascertained the date of delivery of the notice simply by asking his client on what date it was received. As I have discussed, the notice was received on September 30, 2010, and Petitioner does not aver that it failed to record or take notice of the date of receipt. Indeed, I find it somewhat perplexing that Petitioner's counsel would rely on the regulatory presumption without simply asking his client when the notice had been delivered to it. Moreover, counsel filed the hearing request untimely, even if I accept his contention that he inquired of FedEx as to how it delivered a document and learned from it that it is possible to send a document via FedEx by specifying delivery on the second or third day from the date the notice is sent. Petitioner filed its hearing request on the 64<sup>th</sup> day after receipt of notice, and not on the 62<sup>nd</sup> or 63<sup>rd</sup> day.

Finally, Petitioner argues that the notice was actually signed for by an individual named “I. Castro,” and it asserts that receipt of the notice by this individual was ineffective because she is not a registered agent for service of process. However, there is no requirement in the regulations that the notice be served on a particular individual. What is at issue here is notice – not service – and CMS provided notice in accordance with regulatory requirements.

Petitioner has made no showing of good cause for its failure to timely file a hearing request. It has not demonstrated the presence of any circumstance beyond its control that prevented it from filing a request timely. Consequently, I dismiss the request. 42 C.F.R. § 498.70(b), (c).

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/s/  
Steven T. Kessel  
Administrative Law Judge