

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Marian Estates, (CCN: 38-5240),)	Date: June 19, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-241
)	Decision No. CR1960
Centers for Medicare & Medicaid)	
Services.)	

DECISION

Having considered the parties' arguments and exhibits, I dismiss Petitioner's hearing request as it relates to the Centers for Medicare & Medicaid Services' (CMS) notice letter dated December 2, 2008. Petitioner did not file a timely request for hearing as required by 42 C.F.R. § 498.40(a)(2). Petitioner has not established good cause for extending the time within which it may file its hearing request.

I. Background

Petitioner, a long-term care facility located in Sublimity, Oregon, participated in the Medicare program as a skilled nursing facility (SNF) and in the Oregon Medicaid program as a nursing facility (NF). On September 17, 2008, the Oregon Bureau of Facility Standards' Client Care Monitoring Unit (state survey agency) and the Office of the State Fire Marshal conducted surveys of Petitioner's facility to determine whether Petitioner was in substantial compliance with federal participation requirements. Petitioner was found out of substantial compliance. On December 2, 2008, CMS imposed a \$3,000 civil money penalty (CMP) based on that noncompliance and advised Petitioner of its right to a hearing. Specifically, the December 2, 2008 letter stated,

If you disagree with this determination, 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. Procedures governing this process are set out in 42 CFR § 498.40, et seq. A written request for a hearing **must be filed no later than 60 days** from the date of receipt of this letter.

CMS exhibit (CMS Ex.) 7, at 2. Petitioner received a copy of CMS's December 2, 2008 notice letter on December 2, 2008 by FAX. CMS Ex. 7, at 4. A copy of the notice letter was sent to Petitioner by certified mail and the receipt was signed by an individual named Shirley Henkel on December 5, 2008. CMS Ex. 7, at 5. Petitioner requested a hearing by letter dated February 5, 2009, 65 days after the December 2, 2008 date on the notice letter and 62 days after Ms. Henkel signed the certified mail receipt.¹

CMS filed a motion to dismiss for untimely filing on April 13, 2009 (CMS Br.), accompanied by CMS Exs. 1-14. Petitioner responded on May 13, 2009 (P. Br.), accompanied by Petitioner's exhibits (P. Ex.) A-C and the affidavits of Kelly Giampa and Cindi Franck. I am marking Ms. Giampa's affidavit P. Ex. D and Ms. Franck's affidavit P. Ex. E. In the absence of objection, I admit CMS Exs. 1-14 and P. Exs. A-E.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues in this case are:

1. Whether Petitioner timely filed a request for hearing as it relates to CMS's notice letter of December 2, 2008.
2. Whether Petitioner has shown good cause to extend the time in which to file a request for hearing related to CMS's notice letter of December 2, 2008.

B. Findings of Fact and Conclusions of Law

I make Findings of Fact and Conclusions of Law (Findings) to support my decision. I set forth each Finding below as a separately numbered heading. I discuss each Finding in detail.

¹ I only consider whether Petitioner's hearing request is untimely with regard to the notice letter sent by certified mail, not with regard to the FAX sent on December 2, 2008. *See Riverview Village*, DAB No. 1840, at 8 (2002) (CMS's mailed notice, not the facsimile, triggered the period for Riverview to request a hearing because the FAX did not clearly and unambiguously specify that it was the notice document).

1. *Petitioner failed to file its hearing request within 60 days of CMS's December 2, 2008 notice letter, as required by the applicable statute and regulations.*

Section 1866(h) of the Social Security Act (Act) authorizes administrative review of determinations that a provider fails to comply substantially with a provider agreement entered into with the Secretary of Health and Human Services (Secretary). The Secretary's regulations mandate that an affected party file its hearing request "in writing within 60 days from receipt of the notice . . . unless that period is extended in accordance with paragraph (c) of this section (Presumed date of receipt is determined in accordance with § 498.22(b)(3))." 42 C.F.R. § 498.40(a). Under section 498.22(b)(3), receipt 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."

Here, Petitioner's compliance officer, Ms. Franck, admits in her affidavit that "Shirley Henkel is a former receptionist at Marian Estates. She worked in the reception office where mail is received." P. Ex. E, at 2 ¶ 9. CMS submitted evidence that Ms. Henkel certified receipt by Petitioner of the notice letter 62 days before Petitioner requested a hearing. CMS Ex. 7, at 5. Although the regulations allow for a presumption of five days for mailing, where there is a showing, as here, that the notice was received earlier, the specific showing of receipt trumps the presumption of receipt. Ms. Henkel's signature shows Petitioner in fact received the notice letter on December 5, 2009. Petitioner filed its hearing request on February 5, 2009 – 62 days later. Petitioner's hearing request was thus untimely filed.

2. *No good cause exists to extend the time for filing.*

On the motion of a party, or on his or her own motion, an administrative law judge (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). The regulations set the conditions under which an ALJ may decline to dismiss a hearing request. First, a petitioner must file a request to extend the time limit stating why the hearing request was not filed on time and, second, there must be "good cause" to grant the extension. The regulations state:

(c) *Extension of time for filing a request for hearing.* If the request was not filed within 60 days –

- (1) The affected party or its legal representative or other authorized official may file with the ALJ a written request for extension of time stating the reasons why the request was not filed timely.

- (2) For good cause shown, the ALJ may extend the time for filing the request for hearing.

42 C.F.R. § 498.40(c)(1) and (2). I construe Petitioner's hearing request, and the related response to CMS's motion to dismiss, as Petitioner's request for an extension of time to file its hearing request. I then evaluate Petitioner's arguments to determine whether good cause exists to extend the time for filing.

Good cause has been defined as "circumstances beyond the ability of the provider to control." *Hospicio San Martin*, DAB No. 1554, at 5 (1996); *see also Quality Total Care, L.L.C. d/b/a the Crossings*, DAB No. 2242, at 4 n. 4 (2009). Here Petitioner asserts the "circumstances of Marian Estate's receipt of CMS's determination notice support the ALJ's denial of CMS's motion to dismiss." P. Br. at 7. Specifically, Petitioner asserts that because it could not identify the precise date CMS's notice letter arrived it relied on the presumptive guidelines set forth in detail above. Additionally, Petitioner argues that CMS's service of notice created legitimate confusion as to when filing should be made.

The reasons Petitioner gives for its inability to identify the precise date CMS's notice letter arrived include that,

Marian Estates is a large campus with five assisted living and elder care facilities. (Franck Aff., ¶ 3.) Marian Estates has approximately 500 staff members and up to 500 residents within those five facilities. *Id.* When mail arrives at the facility, it goes through a reception desk at the Reece Center. *Id.* The incoming mail is neither opened nor date stamped when it arrives at the receptionist's desk. (Franck Aff., ¶ 4.) It would be highly impractical to implement a procedure where mail is time stamped upon receipt. (Franck Aff., ¶ 5.) Rather, the mail is sorted and then delivered to the mailbox of the intended recipient. (Franck Aff., ¶ 4.) Because of the size of the facility, mail typically takes an additional business day to reach its destination even after it . . . reaches the Marian Estates Campus. (Franck Aff., ¶¶ 4-6.)

In this particular case, CMS offers a certified mail receipt indicating that its notice letter was signed for by a former Marian Estates receptionist. (CMS Ex. 7, p. 5); (Franck Aff., ¶ 9.) The notice letter itself was addressed to Administrator Denise Gould, rather than compliance officer Cindi Franck, who handled Marian Estate's IDR of the citations imposed by the state survey agency. (Giampa Aff., Ex. B, p. 1); (Franck Aff., ¶ 2.) Therefore upon reaching Gould, the letter had to be re-routed to Franck. (Franck Aff., ¶ 8.)

Although CMS argues that Marian Estates received mail notice of its determination on Friday, December 5, it is highly likely that CMS's letter did not reach either Gould or Franck until Monday, December 8, or later. (Franck Aff., ¶ 10.) Because there was no practical procedure to stamp incoming mail, it would

have been nearly impossible for either Gould or Franck to determine the precise date the notice arrived. (Franck Aff., ¶¶ 4-8.) Further, the notice itself provides little information about determining the date of receipt. Specifically the letter states only that “[p]rocedures governing this process are set out in 42 CFR § 498.40 et. seq.”: (Giampa Aff., Ex. B, p. 2.)

P. Br. at 7.

Petitioner’s assertions highlight that Petitioner could not specify the exact date of receipt of the notice letter due to its own processes for receipt and disbursement of mail, not because of any defect in CMS’s notice or problem outside of Petitioner’s own control. That Petitioner’s mail practices may have delayed receipt of the notice letter by the individual detailed by Petitioner to deal with the issues by a day or two does not act to extend the 60-day period Petitioner had to request a hearing. Moreover, waiting until the last minute to request a hearing, as Petitioner did here, does not make sense where the process for mail receipt at the facility does not ensure a known date of receipt. Further, although Petitioner argues that the notice is confusing, the appeal rights section of the notice is crystal clear that Petitioner’s hearing request needed to be filed no later than 60 days from the date of receipt of the letter. It is simply not good cause to assert that a function over which Petitioner had the ultimate control (how mail is received and disbursed on its own campus) constitutes good cause for untimely filing.

Petitioner also insinuates that it should be allowed a hearing because it filed its hearing request within the presumption of receipt period. However, as noted above, the presumption of receipt is only applicable when there is no specific showing of receipt. CMS made that showing. Although Petitioner’s hearing request may have been two days, not two months or two years out of time, it was, nevertheless, untimely without good cause.

III. Conclusion

Petitioner’s hearing request was filed 62 days from its receipt of CMS’s notice letter and is untimely. Petitioner has not shown good cause to extend the filing date. Accordingly, I dismiss Petitioner’s hearing request.

/s/
Alfonso J. Montano
Administrative Law Judge