Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Hospicio San Martin,	)	Date: August 22, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-149
	)	Decision No. CR387
Health Care Financing Administration.	)	
	)	

DECISION

I am dismissing the request for hearing that Petitioner made in this case. Petitioner made the request untimely and has no right to a hearing. Furthermore, Petitioner has not shown good cause for making the untimely request.

I. Background

On June 27, 1995, Petitioner submitted a request for an extension of time in which to file a hearing request with the Civil Remedies Division of the Departmental Appeals Board (DAB). I have determined to treat this document as a request for a hearing. On July 21, 1995, I held a prehearing conference. The Health Care Financing Administration (HCFA) advised me that it wished to move to dismiss Petitioner's request for a hearing. I directed HCFA and Petitioner to file briefs and exhibits addressing the issue of whether I should grant a hearing to Petitioner. HCFA and Petitioner each filed a memorandum, accompanied by exhibits.[1]

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[1] HCFA submitted seven exhibits with its motion to dismiss (HCFA Exs. 1 - 6, 8). HCFA did not submit an exhibit that it designated as HCFA Ex. 7. HCFA did not submit any exhibits with its "Reply to Petitioner's Motion in Compliance of Order." Petitioner submitted seven exhibits with its "Motion in Compliance of Order." It designated these exhibits as exhibits "A" through "G." I have redesignated these exhibits as P. Exs. 1 - 7. I hereby admit into evidence HCFA Exs. 1 - 6 and 8, and P. Exs. 1 - 7.

II. Issues, findings of fact and conclusions of law

The issues in this case are whether Petitioner made its request for a hearing timely, and whether, assuming Petitioner did not make its request timely, good cause exists to grant Petitioner a hearing. I make the following findings of fact and conclusions of law. After each finding or conclusion, I cite to the page or pages in this decision at which I discuss the finding or conclusion in detail.

1. Petitioner would have had a right to a hearing in this case had it made its request by May 4, 1995, within 65 days from the date it received a notice from HCFA that HCFA was terminating Petitioner's participation in the Medicare program. Pages 5 - 6.

2. Petitioner did not make its request for a hearing by May 4, 1995. Pages 5 - 6.

3. Petitioner does not have a right to a hearing. Pages 5 - 6.

4. Petitioner did not prove that it was misled by HCFA into making its request for a hearing out of time. Pages 6 - 8.

5. Petitioner did not prove that it was prevented from making a timely request for a hearing by circumstances beyond its ability or control. Pages 6 - 8.

6. Petitioner did not establish good cause for making its request for a hearing out of time. Pages 6 - 8.

III. Analysis

A. Governing law

The process by which a provider that is affected by a determination made by HCFA may request a hearing from that determination is governed by regulations contained in 42 C.F.R. Part 498. In order to be entitled to a hearing, an affected provider must make its request within 60 days from the date that the provider receives notice from HCFA of HCFA's determination. 42 C.F.R. § 498.40(a)(2). A provider who does not make a timely hearing request is not entitled to a hearing.

A provider is presumed to have received a notice of a determination by HCFA five days from the date of the notice, unless there is a showing that the provider actually received the notice at an earlier or later date. 42 C.F.R. §§

498.22(b)(3); 498.40(a)(2). Thus, absent proof that a provider actually received notice earlier or later than five days from the date of the notice letter, the provider must make its request for a hearing within 65 days of the notice, in order to be entitled to a hearing.

An administrative law judge has limited discretion to extend the time within which a provider may file a request for a hearing. 42 C.F.R. § 498.40(c)(1),(2). An extension may be granted based only on proof by the provider that good cause exists for not having made a hearing request on time. Id.

The regulations do not define the term "good cause." The term has been held to mean circumstances beyond the ability of the provider to control, which intervened to prevent the provider from making a timely hearing request. See Mira Tomesevic, DAB CR17 (1989).

In its brief, Petitioner appears to argue that the standard for good cause is contained in 42 C.F.R. § 473.22. This regulation governs requests for hearings from determinations made by peer review organizations, and not HCFA. It is not directly applicable to this case. However, the examples of what constitutes good cause contained in 42 C.F.R. § 473.22(b)(1) - (8) all are examples of circumstances that would be beyond the ability of a party requesting a hearing to control, and which would prevent that party from requesting a hearing in time. Thus, these examples are consistent with the definition of good cause that I found in Tomesevic, and which I apply here.

B. Summary of the relevant facts

I summarize the relevant facts as follows. On March 1, 1995, HCFA notified Petitioner that it was terminating Petitioner's participation in the Medicare program. HCFA Ex. 1; P. Ex. 1. In that letter, HCFA advised Petitioner that Petitioner could request a hearing before an administrative law judge, if it believed that HCFA's determination was not correct. HCFA Ex. 1; P. Ex. 1 at 2. HCFA advised Petitioner that the regulations that governed the hearing process are at 42 C.F.R. § 498.40 et seq. Id. HCFA advised Petitioner also that Petitioner must file a written request for a hearing no later than 60 days from Petitioner's receipt of the notice letter. Id.

Petitioner does not deny receiving the notice letter from HCFA. Indeed, by making its copy of the letter an exhibit, Petitioner admits having received it. See P. Ex. 1. Petitioner has not acknowledged the date on which it received the letter. Petitioner does not deny that it made its

request for a hearing more than 60 days from the date it received the notice of termination from HCFA.

In the weeks following Petitioner's receipt of the notice of termination, Petitioner communicated with HCFA, both in writing and in conversations between Petitioner's director, Edwin Arroyo, M.D., and HCFA's representatives. The written communications are in the exhibits which I have received into evidence. For purposes of deciding this case, I am accepting as true Petitioner's representations concerning the conversations that Dr. Arroyo had with HCFA's representatives.

On March 16, 1995, Dr. Arroyo visited HCFA's regional office in New York. HCFA Ex. 2; P. Exs. 2, 3. Dr. Arroyo was not told by HCFA's representatives that he could make a hearing request in person, on behalf of Petitioner, during his visit.

On May 16, 1995, Dr. Arroyo wrote to HCFA's regional office. HCFA Ex. 4; P. Ex. 4. In that letter, Dr. Arroyo noted that, on March 20, 1995, after his visit to the New York regional office, HCFA's representatives had advised him by telephone that they had reviewed documents supplied to HCFA by Petitioner. HCFA Ex. 4; P. Ex. 4 at 1. He acknowledged that, on that date, HCFA's representatives had told him that the determination to terminate Petitioner's participation in Medicare remained in effect. Id.

Dr. Arroyo stated that "we did not take the decision of appeal, because . . . [HCFA's representatives] indicated [to] us that our hospice had a priority position in being revised (sic) at this time for a new certification." HCFA Ex. 4 at 2; P. Ex. 4 at 2. He stated further that, on May 15, 1995, he had called HCFA's representative to request a new survey, but had been advised that a new survey was not scheduled, "because HCFA considered the revisit of 26th of January as the last chance, and that our hospice was the last one of the survey list." Id. Dr. Arroyo again stated that Petitioner had corrected outstanding deficiencies. He complained also about the way in which HCFA had conducted its last survey of Petitioner. Finally, Dr. Arroyo requested that HCFA's representative analyze Petitioner's situation, and in essence requested that HCFA schedule a new survey of Petitioner. Id.

On May 30, 1995, Dr. Arroyo wrote to HCFA, on behalf of Petitioner, requesting an extension of time within which to request a hearing. HCFA Ex. 5. In that letter, Dr. Arroyo asserted two reasons for Petitioner not making a timely request for a hearing. First, Dr. Arroyo asserted that, since early 1995, Petitioner had attempted to convince HCFA that there were errors in both the survey process and in the findings on which HCFA based its determination to terminate

Petitioner's participation in Medicare. Id. Dr. Arroyo asserted that Petitioner had been unable to find information that was relevant to its assertions about HCFA's determination to terminate Petitioner's participation in Medicare, until recently. Id.

Second, Dr. Arroyo asserted that he had been suffering from an old cardiac condition which had kept him out of his office. HCFA Ex. 5 at 1. Dr. Arroyo averred that the person whom he had left in charge in his absence had left his position in April 1995 without locating the information with which Petitioner could demonstrate the alleged errors in the survey process and findings. Id.

On June 21, 1995, HCFA responded to Dr. Arroyo's May 30, 1995 letter requesting an extension of time to submit a hearing request. HCFA Ex. 6; P. Ex. 7. In that letter, HCFA advised Petitioner that HCFA was unaware of provisions in the regulations permitting an extension of time for requesting a hearing. HCFA advised Petitioner to request a hearing with an administrative law judge and to request the administrative law judge to grant Petitioner a hearing, notwithstanding the fact that the request would be untimely. Id.

On June 27, 1995, Dr. Arroyo wrote to the DAB on behalf of Petitioner, requesting an extension of time within which to make a request for a hearing. In that letter, Dr. Arroyo asserted four reasons for not making a hearing request timely. First, he reiterated that Petitioner had experienced difficulties in compiling information to demonstrate that HCFA had made errors in its determination to terminate Petitioner's participation in Medicare. Second, Dr. Arroyo asserted again that Petitioner had been hampered in its efforts to identify the alleged errors by Dr. Arroyo's medical condition and by the departure in April of the individual whom Dr. Arroyo had designated as his replacement. Third, Dr. Arroyo asserted that, as of the date of his letter, Petitioner had information to show that HCFA had erred in its determination to terminate Petitioner's participation in Medicare. Finally, Dr. Arroyo asserted that Petitioner had been delayed in requesting a hearing by the failure of HCFA to respond quickly to Dr. Arroyo's May 30, 1995 letter to HCFA.

C. Analysis of the facts and law

From the foregoing facts and law, I conclude that Petitioner is not entitled to a hearing because it did not make its request for a hearing timely. I conclude also that Petitioner has not shown that it was prevented from making a timely request for a hearing by circumstances that were beyond its ability to control. Therefore, I conclude that

Petitioner has not established good cause to extend the period within which it may make a request for a hearing.

Pursuant to 42 C.F.R. § 498.40, Petitioner would have been entitled to a hearing had it made its request by May 4, 1995. That date is 65 days from the date of HCFA's notice of termination. Petitioner did not do so. Even if I construe Petitioner's May 30, 1995 letter to HCFA as constituting a hearing request, Petitioner made that request more than three weeks after the deadline for requesting a hearing.

Petitioner has not demonstrated that it was prevented from making a timely hearing request by circumstances beyond its ability to control. In deciding that Petitioner has not demonstrated good cause, I have considered two arguments that Petitioner makes to justify its untimely request for a hearing. These are that Petitioner was:

- misled by HCFA into believing that it would be granted an extension of time to make its request for a hearing.

- unable to make a timely hearing request because of the health problems of its director, Dr. Arroyo.

The notice which HCFA sent to Petitioner on March 1, 1995 explicitly told Petitioner that it had 60 days to request a hearing. HCFA Ex. 1; P Ex. 1. There is nothing ambiguous or misleading about the notice.

There were no communications between HCFA and Petitioner after March 1, 1995 which might have misled Petitioner into believing that it should defer making its hearing request beyond 60 days or that it would be granted an extension of time within which to request a hearing. The communications which Petitioner identified as having occurred in March 1995 did not address the issues of whether or when Petitioner should make a hearing request.

Dr. Arroyo's May 16, 1995 letter to HCFA, which he wrote after the deadline for requesting a hearing had passed, does not demonstrate that Petitioner was misled by HCFA into not requesting a timely hearing. In that letter, Dr. Arroyo asserts that Petitioner had not requested a hearing, allegedly because HCFA had assured Petitioner that it enjoyed a priority for a survey to determine whether it met Medicare participation requirements. Dr. Arroyo neither states nor suggests that HCFA told Petitioner that it should not make a request for a hearing, or that it would be recertified. At most, Dr. Arroyo's statement suggests that Petitioner may

have elected to forego making a request for a hearing because it thought that HCFA would resurvey it promptly.[2]

Assuming that Dr. Arroyo's characterization of what he was told by HCFA is true, that does not establish that HCFA misled Petitioner into believing that it should not request a hearing. HCFA did not encourage Petitioner to forego requesting a hearing. HCFA did not provide any assurances to Petitioner that Petitioner would be recertified at an early date if it did not request a hearing. Even if HCFA may have misled Petitioner into concluding that it enjoyed a priority for a resurvey, HCFA did not assure Petitioner that it would be recertified or that there would be any benefit accruing to Petitioner in not timely requesting a hearing.

The first communication which Petitioner has identified as addressing the subject of an extension of time within which to request a hearing was Dr. Arroyo's May 30, 1995 letter. Dr. Arroyo wrote that letter more than three weeks after 60 days from the date that HCFA sent the notice of termination to Petitioner. The letter does not contain anything to support a conclusion that Petitioner had been misled into believing that it did not have to make a timely request for a hearing.

The June 21, 1995 letter, which HCFA sent to Petitioner in response to Dr. Arroyo's May 30, 1995 letter, did not mislead Petitioner into delaying its request for a hearing. HCFA sent that letter to Petitioner many weeks after the deadline for requesting a hearing had elapsed. The letter responded to Petitioner's acknowledgment that Petitioner had failed to make a timely hearing request. The letter advised Petitioner to address its request for an extension of time to an administrative law judge. Petitioner responded to that advice by promptly making a request to the DAB for an extension of time.

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[2] Dr. Arroyo's May 16, 1995 letter does suggest some confusion as to HCFA's survey and certification process. It is apparent from the letter that HCFA communicated to Petitioner that it would not resurvey Petitioner to determine whether Petitioner had corrected outstanding deficiencies, because HCFA had terminated Petitioner's participation in Medicare. However, HCFA's decision to not reopen its determination to terminate Petitioner's participation by conducting a resurvey, does not preclude Petitioner from making a new application to HCFA to be certified as a provider.

Petitioner has not shown that Dr. Arroyo's illness prevented Petitioner from making a timely request for a hearing. Based on Dr. Arroyo's assertions concerning the effects of his illness, it would appear that his illness may have hampered Petitioner's efforts to develop evidence refuting HCFA's conclusion that termination was appropriate. But Petitioner has not shown (or even asserted) that Dr. Arroyo's illness was so severe as to prevent Petitioner from making a request for a hearing. Indeed, Dr. Arroyo personally visited HCFA's New York regional office in March 1995, after having received the notice of termination. Thus, Dr. Arroyo's activities after having received the termination notice from HCFA suggest that he was capable of assisting Petitioner in making a request for a hearing.

III. Conclusion

I conclude that Petitioner is not entitled to a hearing. Petitioner has not shown good cause for failing to make a timely hearing request. Therefore, I dismiss Petitioner's request for a hearing.

/s/

Steven T. Kessel
Administrative Law Judge