Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ada Care Center,
(CCN: 37-5464),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-191

Ruling No. 2014-10

Date: November 4, 2013

ORDER OF DISMISSAL

I dismiss Petitioner's hearing request, filed December 2, 2012, in response to the Centers for Medicare & Medicaid Services (CMS) notice letter dated September 5, 2012. Petitioner did not file a timely request for hearing, as required by 42 C.F.R. § 498.40(a)(2), or establish good cause to extend the time within which it could file, as required by 42 C.F.R. § 498.40(c).

Background

Petitioner is a long-term care facility located in Ada, Oklahoma and participates in the Medicare program. Based on a survey completed on July 23, 2012, CMS notified Petitioner, by faxed letter dated September 5, 2012, that it was not in substantial compliance with Medicare participation requirements and that CMS was imposing a per day civil money penalty (CMP) of $4,550 for July 20 and 21, 2012, and a per day CMP of $850 beginning July 22, 2012 and continuing until further notice. The notice letter also stated that CMS would terminate Petitioner's provider agreement if it did not achieve substantial compliance before January 23, 2013, and that denial of payment for new admissions (DPNA) would begin on August 29, 2012. The notice letter informed

Petitioner that if it disagreed with CMS's determinations, it could request a hearing before an administrative law judge (ALJ) within 60 days of its receipt of the notice letter. CMS Ex. 1, at 6-9.

By letter dated December 2, 2012, Petitioner filed a hearing request and a request for an extension of time to file that hearing request. The hearing request and request for extension were docketed and the case assigned to me on December 12, 2012. On January 7, 2013, CMS filed a motion to dismiss arguing Petitioner's hearing request was untimely filed and no good cause exists to extend the time for filing (CMS Br.).[1] CMS filed one exhibit, CMS Ex. 1, with its motion. Petitioner filed a response (P. Br.) on January 29, 2013, unaccompanied by exhibits. In the absence of objection, I admit CMS Ex. 1 into the record.

Issues

The issues in this case are:

1. Whether Petitioner's hearing request is timely and, if not,

2. Whether there is good cause to extend the time period for Petitioner to file a hearing request.

Petitioner incorrectly argues these issues should be decided based under a summary judgment standard consistent with Rule 56 of the Federal Rules of Civil Procedure, which would require me to draw reasonable inferences in Petitioner's favor as the non-moving party. P. Br. at 3-4. However, CMS did not move for summary judgment, and I'm unaware of any authority that requires to me to use those standards for the purpose of deciding whether Petitioner timely perfected its hearing right.

Findings of Fact and Conclusions of Law

1. Petitioner is not entitled to a hearing because it did not file a timely hearing request.

An affected party must file a request for hearing in writing within 60 days from receipt of the notice unless that period is extended. 42 C.F.R. § 498.40(a)(2). On motion of a party, or on his or her own motion, an ALJ may dismiss a hearing request that was not

[1] In the alternative, CMS asks that I dismiss Petitioner's hearing request because Petitioner failed to challenge "numerous" deficiencies supporting CMS's imposed remedies. I do not address this issue because I dismiss the case for untimely filing.

timely filed if the time for filing is not extended. 42 C.F.R. § 498.70(c). Receipt of the notice 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." 42 C.F.R. §§ 498.40(a)(2), 498.22(b)(3).

CMS sent a letter by facsimile transmission (fax), dated September 5, 2012, to Petitioner's "Administrator or Assistant Administrator" notifying Petitioner of remedies CMS was imposing pursuant to the July 23, 2012 survey (in which Petitioner was cited for 25 deficiencies, two of which allegedly constituted isolated immediate jeopardy) and informing Petitioner of its hearing rights. The notice letter itself was not addressed to a specific individual at the facility but was directed simply to "Administrator." CMS Ex. 1, at 5-9. The notice letter clearly states it was being sent by fax only and that no hard copy would follow. Thus, the fax properly constituted the notice document. *See Riverview Village*, DAB No. 1840, at 8 (2002).

The fax required that Petitioner's Administrator, or an authorized representative, sign and return to CMS the fax cover sheet acknowledging receipt of the notice letter. An employee of Petitioner, KS, signed the cover sheet for the notice letter and faxed a copy of the cover sheet back to CMS noting that Petitioner received the fax on September 6, 2012. CMS Ex. 1, at 5. The date 60 days from the notice receipt was November 4, 2012, which passed with no hearing request from Petitioner.

On November 16, 2012, CMS faxed a letter to Petitioner's "Administrator or Assistant Administrator," to the same fax number as the notice letter, notifying Petitioner that it had achieved substantial compliance with participation requirements as of September 15, 2012. CMS Ex. 1, at 1, 2, 5. The fax requested that Petitioner's Administrator, or an authorized representative, sign and fax back the cover page, which Petitioner's Administrator, GH, did on November 19, 2012. CMS Ex. 1, at 1. In the letter, CMS rescinded the termination of Petitioner's provider agreement, noted that the DPNA was in effect from August 29 through September 14, 2012, and finalized the CMP amounts of $9,100 for July 20 and 21, 2012, and $46,750 for 55 days (at $850 per day) of noncompliance beginning July 22, 2012, and continuing through September 14, 2012. CMS also noted that November 4, 2012 had been the last day for Petitioner to request a hearing or waive its right to a hearing and receive a 35% reduction in the total amount of the CMP, neither of which Petitioner disputes it has done. Thus, the entire CMP was due and payable on December 1, 2012. CMS Ex. 1, at 2-4.

2. No good cause justifies extending the time for filing.

An affected party may file a written request for an extension of the 60-day period, stating the reason why a hearing request was not timely filed. For good cause shown, an ALJ may extend the time for filing a hearing request. 42 C.F.R. § 498.40(c). A definition of

"good cause" does not exist in the applicable regulations, and the "[Departmental Appeals] Board has never attempted to provide an authoritative or complete definition of the term 'good cause' . . . ." *Hillcrest Healthcare, L.L.C.*, DAB No. 1879, at 5 (2003). Other ALJ's have interpreted the term "good cause" as a circumstance or circumstances beyond the party-litigant's ability to control. *See, e.g.*, *Sedgewick Health Care Ctr.*, DAB CR596 (1999); *Jackson Manor Health Care, Inc.*, DAB CR545 (1998).

KS was a "secretary/admin.assistant" who Petitioner employed when she acknowledged the receipt of notice but was later "terminated for lack of performance and failure to follow company policy." P. Br. at 2. Petitioner asserts that at no time was KS ever designated as its "Administrator of Record" or otherwise authorized by Petitioner to accept service of process upon the facility. P. Br. at 2. Because CMS was in receipt of the state agency's recommendations, Petitioner argues CMS should have been on notice of the identity of Petitioner's Administrator. Petitioner asserts that after acknowledgment of receipt of CMS's November 16 notice on November 19, 2012, it "took every action in its power to rectify the situation, including filing its appeal and request for extension [within] a mere fourteen (14) days of its discovery of the deadline issue through receipt of CMS's final notice." P. Br. at 6. Petitioner argues that the central issue in the case is thus whether service of the I.G.'s September 5, 2012 notice letter was sufficient for purposes of constitutional due process, as KS was not vested with authority to act for the facility. P. Br. at 6.

The fax cover sheet that KS signed specifically notes that either the Administrator or an "Authorized Representative" can sign and acknowledge the fax. CMS Ex. 1, at 1, 5. At the time Petitioner received CMS's notice, KS was Petitioner's employee and, apparently, in a position to receive a fax on September 6, 2012. For Petitioner to argue that its employee KS was not an agent or authorized representative for purposes of receiving and acknowledging the fax in this case (thus, according to Petitioner, contravening due process) puts an unreasonable burden on CMS to second-guess the authority of Petitioner's employees. That Petitioner gave access to the wrong employee who was in a position to receive, acknowledge, and route faxes, represents avoidable human error, which under any definition would not constitute good cause for untimely filing.

In sum, I find no proof of any circumstance beyond Petitioner's ability to control that might have prevented it from timely requesting a hearing. Petitioner had the basic duty to ensure that its administrative staff informed its administration if a fax had been received and to route that fax to the proper personnel. Petitioner has provided no specific explanation or evidence as to what happened to the fax from CMS that KS received and acknowledged on September 6, 2012. Petitioner simply shifts the blame and argues that CMS should have known that KS was not an Administrator or Assistant Administrator.

For the reasons discussed above, I dismiss Petitioner's hearing request, pursuant to 42 C.F.R. § 498.70(c), because it was not timely filed, and I deny Petitioner's request for an extension of time to file that hearing request, pursuant to 42 C.F.R. § 498.40(c), because no good cause justifies extending the time for filing.

/s/
Joseph Grow
Administrative Law Judge