

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Presbyterian Village,
(CCN: 11-5490),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-700

ALJ Ruling No. 2017-22

Date: July 14, 2017

RULING DISMISSING CASE

For the reasons set forth below, I conclude that Petitioner, Presbyterian Village, failed to show good cause for filing its hearing request out of time. Therefore, I dismiss the hearing request pursuant to 42 C.F.R. § 498.70(c).

Background¹

Petitioner is a skilled nursing facility (SNF) located in Austell, Georgia, that participates in the Medicare program as a provider of services. On February 7, 2017, the Georgia Department of Community Health, Healthcare Facility Regulation Division (state agency) conducted a revisit survey of the facility and found that the facility continued to

¹ I rely on the facts and procedural history recited by Petitioner in its hearing request and response to CMS's motion to dismiss. I accept Petitioner's chronology as true and accurate for purposes of this ruling.

be out of compliance with Medicare participation requirements.² By letter dated March 1, 2017 (March 1 notice), CMS notified Petitioner that previously-imposed remedies would be changed. The March 1 notice went on to inform Petitioner that it had the right to request a hearing before an administrative law judge within 60 days after the date of the notice (which was emailed to Petitioner). The notice further informed Petitioner that it could request Informal Dispute Resolution (IDR) or Independent IDR (IIDR). However, the letter cautioned: “[A]n incomplete IDR . . . process will not delay any deadline listed below under “Appeal Rights” for requesting a hearing, or for requesting a waiver of hearing rights.” (bold type in original).

By letter dated May 16, 2017, Petitioner, through counsel, made a “Formal Request for Extension of Time for Filing Pursuant to 42 C.F.R. § 498.40(c)(1)(1); Formal Request for Hearing Pursuant to 42 C.F.R. § 498.40; and Formal Request to Consolidate” (Req. for Hrg. & Ext.). In it Petitioner acknowledges that it received CMS’s March 1, 2017 notice on that date; Petitioner further acknowledges that its hearing request to challenge the remedies imposed in the March 1 notice was not filed within 60 days from receipt. Req. for Hrg. & Ext. at 3.

As a SNF participating in Medicare, Petitioner may request a hearing before an administrative law judge to challenge “a finding of noncompliance that results in the imposition of a remedy” by CMS or its agent. 42 C.F.R. § 498.3(b)(13); *see also* 42 C.F.R. § 488.330(e)(3). However, to avail itself of the opportunity for a hearing, an affected party must “file the request in writing within 60 days from receipt of the notice . . . unless that period is extended in accordance with paragraph (c) of this section.” 42 C.F.R. § 498.40(a)(2). In turn, 42 C.F.R. § 498.40(c)(2) provides: “For good cause shown, the ALJ may extend the time for filing the request for hearing.”

Discussion

*1. Petitioner has not established good cause for filing its hearing request untimely.*³

CMS has moved to dismiss Petitioner’s hearing request as untimely (CMS Mot.). Petitioner opposes the motion (P. Resp.). Petitioner argues that there is good cause for

² The state agency had previously conducted a survey of the facility from January 17-20, 2017. At that survey, the surveyors found the facility out of substantial compliance and recommended that CMS impose remedies, which CMS did in a notice dated February 1, 2017. Petitioner timely filed a hearing request and that matter is pending before me under Docket No. C-17-511.

³ My conclusions of law appear as numbered headings in bold italic type.

me to grant its request for an extension. Petitioner argues first that, from the time it received the March 1 notice until it filed its hearing request, it was “actively engaged” in communicating with the IIDR panel, with the state agency, and with CMS; thus, it was not “waiting” or “idling” during that period. P. Resp. at 8. Second, Petitioner argues that CMS failed to observe its own regulations and policies, in that it failed to render a timely decision on the IIDR recommendations. P. Resp. at 9-11. Finally, Petitioner argues that CMS would not be harmed by allowing Petitioner to proceed with its hearing request. P. Resp. at 11. Significantly, Petitioner nowhere argues that it was prevented from filing a hearing request by circumstances outside its control. I therefore find that none of Petitioner’s arguments establishes good cause to grant an extension.

As to Petitioner’s first point, for purposes of this ruling, I accept Petitioner’s representation that it was “actively engaged throughout the entire process” of IIDR and CMS review. P. Resp. at 8. However, whether Petitioner was “actively engaged” in the IIDR process or was simply waiting for the process to play out has no bearing on whether there is good cause to grant Petitioner an extension of time. CMS’s March 1 notice stated explicitly that an incomplete IDR process would not excuse a late-filed hearing request.⁴ Thus, Petitioner knew or had reason to know that it must file its hearing request within 60 days of the March 1 notice without regard to whether the IIDR process had been completed. Moreover, Petitioner does not contend that its engagement in the IIDR process prevented it from filing its hearing request. Yet, even had it made that argument, appellate panels of the Departmental Appeals Board (DAB) have held on multiple occasions that a facility’s participation in IDR is not good cause for extending the deadline to file a hearing request. *See, e.g., Hillcrest Healthcare*, DAB No. 1879 (2003); *Concourse Nursing Home*, DAB No. 1856 (2002); *Nursing Inn of Menlo Park*, DAB No. 1812 (2002).

Second, whatever action CMS took or did not take with regard to the IIDR recommendations similarly has no bearing on Petitioner’s obligation to file a timely hearing request. Moreover, contrary to Petitioner’s argument, it is not clear that CMS failed to comply with the regulations governing IIDR. The regulation at 42 C.F.R. § 488.431(a) requires that CMS offer the opportunity for IIDR within 30 days after notice to a facility in which CMS has imposed a civil money penalty that CMS intends to hold in escrow. The regulation further provides that IIDR must be completed within 60 days of the facility’s request. 42 C.F.R. § 488.431(a)(1). In the present case, the imposition notice was dated (and received) March 1, 2017. Petitioner states that it completed a face-to-face IIDR meeting with the dispute resolution panel on March 8, 2017. P. Resp. at 5. Petitioner further represents that it received correspondence, dated March 24, 2017, from

⁴ The information in the March 1 notice is consistent with the regulation at 42 C.F.R. § 488.331(b)(2), which provides that a facility may not seek a delay of any enforcement action on the grounds that IDR has not been completed.

the state agency accepting the dispute resolution panel's recommendation that the deficiencies be deleted. *Id.* Thus, IIDR was completed within 60 days, as is required by regulation.⁵

Given that the IIDR process resulted in a recommendation favorable to Petitioner, it is understandable that Petitioner may have hoped CMS would rescind the remedies at issue and Petitioner would not have needed to file a hearing request as to the March 1 notice. However, as the deadline approached without CMS having acted on the IIDR recommendations, the prudent course for Petitioner would have been to file its hearing request and await further developments.⁶ As an appellate panel of the DAB observed, "nothing prevented Petitioner from timely pursuing its appeal rights while simultaneously trying other ways to persuade CMS to change its mind." *Borger I Enterprises, LLC*, DAB No. 2618 at 4 (2015). Other appellate decisions have consistently concluded that a conscious or tactical choice not to file a hearing request within the time allowed is not good cause to grant an extension of the deadline. *See Nursing Inn of Menlo Park*, DAB No. 1812 (holding that the facility must bear the consequences of its "conscious decision" to focus on its plan of correction and resurvey rather than to prepare an appeal); *see also Borger*, DAB No. 2618 at 4 (finding no good cause where facility "was hoping (in vain, as it turned out) to achieve a satisfactory resolution by means other than a formal hearing before an administrative law judge"). As the appellate panel observed in *Borger*, "Petitioner must bear the consequences of focusing its time and energy on advocacy tactics other than preparing and filing a timely hearing request." DAB No. 2618 at 4.

Petitioner argues, finally, that CMS will not be harmed if I grant Petitioner's motion for an extension. This argument, in essence, represents an appeal to equity – i.e., Petitioner

⁵ This timeline is also consistent with guidance in the State Operations Manual (SOM), which explains that the IIDR process is deemed "completed" when "a final decision from the Independent IDR process has been made, a written record generated AND the State survey agency has sent written notice of the Independent IDR recommendation to the facility." SOM § 7213.9. The point to be made here is that neither the regulation nor the SOM provision requires that CMS complete its review of IIDR results within 60 days of a facility's request.

⁶ I note that, under the letter of 42 C.F.R. § 488.431(a), if a facility requested IIDR 30 days after receiving a notice of remedies and the IIDR entity and state agency required the full 60 days to complete the IIDR process, the facility would receive notice of the IIDR results 90 days after receipt of the notice of remedies. Thus, the time for filing a hearing request would have expired before the IIDR was completed. This further reinforces the conclusion that a facility may well need to decide whether to request a hearing without knowing the final results of the IIDR process. *See* 42 C.F.R. § 488.431(d) (facility must request hearing in accordance with 42 C.F.R. § 498.40).

will suffer harm (loss of its opportunity for a hearing) in the absence of the relief sought, while CMS will not. Even if it were true that CMS would suffer no harm if I granted Petitioner's request for an extension,⁷ the lack of harm to CMS does not establish good cause for Petitioner's failure to file timely. I am "bound by applicable laws and regulations." *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009). Nothing in the language of 42 C.F.R. § 498.40(c)(2) suggests that the absence of harm to CMS is a basis to extend the deadline to file a hearing request. To the contrary, to determine whether there is good cause for late filing, I must examine the facts and circumstances that prevailed when the filing deadline passed and when the extension request was filed. Thus, the good cause analysis is, essentially, backward-looking. By contrast, any analysis balancing the potential harm that may occur to the parties is inherently forward-looking. That is, I must infer what is likely to happen *after* I rule for one party or the other. Such an analysis is inconsistent with 42 C.F.R. § 498.40(c)(2).

For all these reasons, I conclude that Petitioner has not established that it had good cause to file its hearing request out of time.

2. Because Petitioner's hearing request was filed out of time and there is no good cause to grant an extension of the deadline, the hearing request must be dismissed.

Petitioner's hearing request was not filed within 60 days after it received the March 1 notice of remedies, as required by 42 C.F.R. § 498.70(a)(2). As explained in detail above, Petitioner failed to demonstrate that it had good cause for filing its hearing request out of time as provided in 42 C.F.R. § 498.70(c). I therefore deny Petitioner's request for an extension of time to file its hearing request. For the same reasons, I grant CMS's motion to dismiss. Petitioner's hearing request is dismissed.

/s/
Leslie A. Weyn
Administrative Law Judge

⁷ I do not draw this conclusion, as it is at least arguable that CMS may suffer harm in the form of additional litigation costs, should I grant Petitioner's requested extension.