Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Wellington Oaks Care Center,	)	DATE: January 28, 1997
	)	
Petitioner,	)	
	)	
v.	)	Docket No. C-96-203
	)	Decision No. CR456
Health Care Financing Administration.	)	
	)	

DECISION

I conclude that Petitioner, Wellington Oaks Care Center, formerly known as Hearthstone Care Center, did not file its hearing requests timely and has failed to show good cause for extending the time for filing. Consequently, Petitioner has no right to a hearing, and Petitioner's hearing requests are DISMISSED, pursuant to 42 C.F.R. § 498.70(c).

PROCEDURAL BACKGROUND

The Health Care Financing Administration (HCFA) of the United States Department of Health and Human Services (DHHS), has alleged that Petitioner was not in substantial compliance with Medicare participation requirements during two separate periods:

(a) a 33-day period, from September 22, 1995 through October 24, 1995 (first period). For this first period, HCFA imposed a 15-day denial of payment for new admissions (DPNA), from October 10, 1995 through October 24, 1995, and a $136,000.00 civil money penalty (CMP). HCFA Ex. 4.

(b) a 42-day period, from November 29, 1995 through January 9, 1996 (second period). For this second period HCFA imposed a $35,700.00 CMP. HCFA Ex. 8.

As discussed more fully below (at Discussion - I), Petitioner filed requests for hearing for both the first and second periods. HCFA filed a motion to dismiss (HCFA Br.), asserting that Petitioner's hearing requests were untimely filed and that no good cause exists to extend the time for filing. Petitioner filed a response (P. Br.).

Based on the evidence[1] in the written record and the law, in light of the parties' arguments, I conclude that Petitioner failed to file its hearing requests timely, that Petitioner has not shown good cause to extend the time for filing, and that, therefore, Petitioner has no right to a hearing.

ISSUES

There are two issues in this case: 1) whether Petitioner filed its hearing requests timely; and, if not, 2) whether Petitioner has shown good cause to extend the time for filing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a Medicare provider of skilled nursing facility services in Fort Worth, Texas. HCFA Exs. 2, 6.

2. Petitioner is the same Medicare provider, with the same Medicare provider agreement and the same Medicare provider number (45-5674), whether known as Wellington Oaks Care Center (its current name) or as Hearthstone Care Center (its former name). HCFA Exs. 2, 6.

3. Petitioner is the same Medicare provider, with the same Medicare provider agreement and the same Medicare provider number (45-5674), whether owned by William Spencer or by Harold Stewart and other investors. HCFA Exs. 2, 6; P. Br. 3 - 4.

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[1] HCFA did not object to any of Petitioner's exhibits, and I admit into evidence: P. Exs. A, B, C, and D; P. Exs. 1 and 2; and Petitioner's Stipulation of Facts (P. Stip.). Petitioner did not object to any of HCFA's exhibits, and I admit into evidence: HCFA Exs. 1 through 9, and HCFA's Stipulations in Response to ALJ's Order (HCFA Stip.).

The following Findings and Conclusions concern the first period of alleged noncompliance.

4. HCFA alleged that Petitioner was not in substantial compliance with Medicare participation requirements from September 22, 1995 through October 24, 1995, the first period. HCFA Ex. 4.

5. Petitioner's notice of initial determination regarding this first period of alleged noncompliance is HCFA's notice letter dated October 5, 1995. HCFA Ex. 2 at 3 - 5.

6. Petitioner received HCFA's October 5, 1995 notice letter on October 6, 1995. HCFA Ex. 2 at 1 - 2.

7. Petitioner had through December 5, 1995, to request a hearing (60 days from its October 6, 1995 receipt of HCFA's October 5, 1995 notice letter). 42 C.F.R. § 498.40(a)(2).

8. Regarding this first period of alleged noncompliance, I construe Petitioner's attorney's statements on May 16, 1996, during the initial prehearing conference in this case, to constitute an oral request for a hearing. Further, I construe Petitioner's response to HCFA's motion to dismiss (P. Br. at 5 - 6), as confirmation, in writing, on July 31, 1996, of Petitioner's hearing request and of Petitioner's request for extension of time for filing.

9. Regarding the first period, Petitioner's hearing request, which was due by December 5, 1995, was not timely filed. It was more than five months late. Findings 5 - 8.

10. Henry R. Adams, State Appointed Trustee occupying Petitioner from September 27, 1995 through October 12, 1995, received HCFA's October 5, 1995 notice letter, but Petitioner did not request a hearing. HCFA Ex. 9.

11. William Spencer, Petitioner's owner and administrator until October 12, 1995, received HCFA's October 5, 1995 notice letter, but Petitioner did not request a hearing. HCFA Ex. 9 at 3.

12. Harold Stewart, Petitioner's owner (with other investors) beginning October 12, 1995, was sufficiently aware of HCFA's October 5, 1995 notice letter, or the basis for it, to have discussed the responsibility for payment of the CMP with the State Appointed Trustee, presumably before the Trustee left the facility on October 12, 1995. Petitioner did not request a hearing. HCFA Ex. 9 at 1 - 3.

13. HCFA, through a provider agreement, has a contractual relationship with a provider, such as Petitioner, and a change of ownership does not show good cause to extend the time to file a

hearing request. See 42 C.F.R. § 489.18; 59 Fed. Reg. 56,174 (1994).

14. The State Appointed Trustee shared his opinion with Harold Stewart that "the owner of the facility at the time the penalties were incurred would be responsible for paying the fine." HCFA Ex. 9 at 3.

15. Harold Stewart's reliance on the State Appointed Trustee's opinion does not constitute good cause to extend the time to file a hearing request.

16. Petitioner's second notice (no second notice is required) regarding this first period of alleged noncompliance is HCFA's notice letter dated October 25, 1995. HCFA Ex. 3.

17. Petitioner received HCFA's October 25, 1995 notice letter on October 26, 1995. HCFA Ex. 3 at 1 - 2.

18. After October 12, 1995, the direction by Petitioner's Interim Administrator, Carol Egbert, to Petitioner's receptionist, Nona Polson, to forward all mail and facsimile transmissions addressed to Hearthstone Care Center, unread and unopened, to William Spencer's post office box, does not constitute good cause to extend the time to file a hearing request. P. Ex. D; P. Br. 5.

19. Petitioner's failure to read and act upon information contained in letters and facsimile transmissions sent by HCFA to Hearthstone Care Center does not constitute good cause to extend the time to file a hearing request. Finding 18.

20. Petitioner's new or renewed awareness of the CMP remedy, as a result of HCFA's April 3, 1996 notice that the CMP payment based on the first period was then due, does not constitute good cause to extend the time to file a hearing request.

21. Both HCFA's October 5, 1995 notice letter (HCFA Ex. 2), and HCFA's October 25, 1995 notice letter (HCFA Ex. 3), specified the requirements for requesting a hearing, stating precisely the addresses of the only two offices, the DHHS Departmental Appeals Board and HCFA's Associate Regional Administrator, Division of Health Standards and Quality, to which a hearing request could be sent. HCFA Exs. 2 at 4 - 5, 3 at 4.

22. Regarding the first period of alleged noncompliance, Petitioner failed to file its hearing request timely and has failed to show good cause to extend the time for filing.

23. Petitioner's hearing request regarding the first period of alleged noncompliance is DISMISSED, pursuant to 42 C.F.R. § 498.70(c).

The following Findings and Conclusions concern the second period of alleged noncompliance.

24. HCFA alleged that Petitioner was not in substantial compliance with Medicare participation requirements from November 29, 1995 through January 9, 1996, the second period. HCFA Ex. 8.

25. Petitioner's notice of initial determination regarding this second period of alleged noncompliance is HCFA's notice letter dated January 17, 1996. HCFA Ex. 6.

26. HCFA's January 17, 1996 notice letter was sent to Petitioner by U.S. Mail, and is presumed by regulation to have been received within five days from that date, absent evidence to the contrary. HCFA Stip. at 2, number 6; P. Stip., number 2; 42 C.F.R. § 498.40(a)(2), incorporating § 498.22(b)(3).

27. Petitioner had through March 22, 1996, to request a hearing (60 days from January 22, 1996, the presumed receipt date of HCFA's January 17, 1996 notice letter). 42 C.F.R. § 498.40(a)(2).

28. The letter Petitioner sent to the Texas Department of Human Services (TDHS) on January 11, 1996, does not constitute a hearing request regarding this second period of alleged noncompliance. HCFA Ex. 7 at 2 - 3.

29. I construe Petitioner's April 4, 1996 facsimile to HCFA, forwarding Petitioner's January 11, 1996 letter, as Petitioner's hearing request regarding this second period of alleged noncompliance (HCFA Ex. 7 at 1 - 3). Further, I construe Petitioner's response to HCFA's motion to dismiss (P. Br. at 16) as Petitioner's written request for an extension of time for filing.

30. Regarding the second period, Petitioner's hearing request, which was due by March 22, 1996, was not timely filed. See Findings 27, 29.

31. Petitioner's filing with the TDHS does not constitute good cause to extend the time to file a hearing request, even assuming that, in fact, TDHS Hearings Division personnel represented that any notices filed with the TDHS that should have been filed with HCFA would be forwarded to HCFA, and even where some confusion remained about the governing regulations, which had been in effect only about six months. P. Br. at 8 - 9.

32. HCFA's January 17, 1996 notice letter (HCFA Ex. 6) specified the requirements for requesting a hearing, stating precisely the addresses of the only two offices, the DHHS Departmental Appeals Board and HCFA's Associate Regional Administrator, Division of

Health Standards and Quality, to which a hearing request could be sent. HCFA Ex. 6 at 2.

33. Regarding the second period of alleged noncompliance, Petitioner failed to file its hearing request timely and has failed to show good cause to extend the time for filing.

34. Petitioner's hearing request regarding the second period of alleged noncompliance is DISMISSED, pursuant to 42 C.F.R. § 498.70(c).

DISCUSSION

I. Petitioner's hearing requests

The process by which a provider affected by a determination made by HCFA may request a hearing is governed by regulations contained in 42 C.F.R. § 498. In order to be entitled to a hearing, an affected provider must make a hearing request within 60 days from the date the provider receives notice from HCFA of HCFA's determination, unless that period is extended for good cause shown. 42 C.F.R. § 498.40.

If the 60-day deadline for filing a hearing request has passed and a provider wants a hearing, the provider must submit a written request for an extension of time, stating the reasons why a hearing request was not filed timely. An administrative law judge may extend the filing period if a petitioner has shown good cause to do so. 42 C.F.R. § 498.40(c).

In this case, in accordance with the regulations, HCFA's notice letters stated that Petitioner's hearing requests were to be filed with either HCFA's Associate Regional Administrator, Division of Health Standards and Quality, or the DHHS Departmental Appeals Board, within 60 days of the date of Petitioner's receipt of HCFA's notice letters. HCFA's notice letters[2] provided Petitioner also with the precise addresses to which to send its hearing requests.

When this case was docketed, Petitioner had not filed a hearing request, or a request for an extension of time for filing, regarding the first period of alleged noncompliance. Petitioner's April 4, 1996 filing concerned only the second period of alleged noncompliance.

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[2] Here I refer to HCFA's notice letters dated October 5, 1995 (HCFA Ex. 2), October 25, 1995 (HCFA Ex. 3), and January 17, 1996 (HCFA Ex. 6).

When HCFA forwarded Petitioner's filing to the Departmental Appeals Board, HCFA attached to Petitioner's filing not the related January 17, 1996 notice letter which concerned the second period of alleged noncompliance, but, rather, HCFA's letter dated April 3, 1996, regarding payment of the CMP, plus interest, that arose out of the first period of alleged noncompliance. Thus, HCFA accelerated the issue of the first period of alleged noncompliance to the forefront.

At the initial prehearing conference, counsel discussed both "sets" of remedies, and HCFA indicated that, regarding both "sets," it would file a motion to dismiss. I have construed the statements made by Petitioner's attorney on May 16, 1996, during the initial prehearing conference, as an oral request for a hearing regarding the first period of alleged noncompliance. Further, I have construed Petitioner's brief at 5 - 6 as confirmation, in writing, on July 31, 1996, of Petitioner's request for a hearing, plus Petitioner's written request for an extension of time for filing.

With regard to the second period of alleged noncompliance, I have construed Petitioner's April 4, 1996 facsimile to HCFA, forwarding a copy of Petitioner's January 11, 1996 letter to the TDHS, as Petitioner's hearing request regarding the second period of alleged noncompliance. Further, I have construed Petitioner's brief at 16 as Petitioner's written request for an extension of time for filing.

II. Untimeliness of filing

Neither of Petitioner's hearing requests were filed timely. Findings 5 - 9 and 25 - 30. Petitioner can receive a hearing only if I find good cause to extend the time for filing. 42 C.F.R. § 498.40(c)(2).

III. Good cause analysis regarding extension of time for filing

The regulations do not specify what constitutes good cause to extend the time for filing a hearing request. 42 C.F.R. § 498.40(c). Thus, each case can be evaluated on its own facts. Other administrative law judges have held that good cause is shown where a party is prevented from filing a hearing request by some intervening force or event beyond the party's ability to control which prevents that party from filing a hearing request timely. Hospicio San Martin, DAB CR387 (1995); aff'd DAB 1554 (1996); Gilmer Care Center, Docket No. C-94-406, Order Dismissing Request For Hearing (November 9, 1994); All Seasons Nursing Center, Docket No. C-94-031, Order Dismissing Request For Hearing (March 14, 1994).

Without formulating any universal rule as to what should constitute good cause in every case, I find that the facts of this case do not justify extending the 60-day period for requesting a hearing. Further, in accord with other administrative law judges, as is shown below, I find that none of the circumstances which exist in this case were beyond Petitioner's ability to control. Instead, I find that Petitioner received the HCFA notice letters and made choices: not to apprise itself timely of the full implications of the remedies; not to appeal the remedies; and not to follow the instructions in the notice letters as to where and how to file its hearing requests.

Below, I address the various arguments Petitioner has raised in support of its assertion that good cause exists to extend the time for filing.

A. The first period of alleged noncompliance

1. Change of ownership does not constitute good cause.

In essence, Petitioner argues that its change in ownership alone constitutes good cause to extend the time for filing. I disagree. To be eligible for Medicare reimbursement, a skilled nursing facility such as Petitioner must have a Medicare provider agreement with HCFA. 42 C.F.R. § 489.3. New owners, Harold Stewart and other investors, acquired Petitioner on October 12, 1995. P. Br. at 4. When a change of ownership as specified in the regulations occurs, the existing provider agreement is automatically assigned to the new owner. 42 C.F.R. § 489.18. Here, the change of ownership was approved effective October 12, 1995. P. Ex. 1 at 2.

The preamble to the regulations that became effective July 1, 1995, shows that a facility is purchased "as is," and that a new owner acquires the compliance history, as well as the assets, of the previous owner:

> A facility's prior compliance history should be considered regardless of a change in ownership. A facility is purchased "as is." The new owner acquires the compliance history, good or bad, as well as the assets. While we agree that after consideration of the facility's compliance history, HCFA or the State may conclude that such history is no longer a valid predictive factor of the facility's ability to achieve and maintain compliance (for example, following a change of ownership where the new owner "cleans house") the burden of proof is on the new owner to demonstrate that poor past performance no longer is a predictive factor.

59 Fed. Reg. 56,174 (1994).

Enforcement remedies imposed upon the provider, in connection with a provider agreement, are not affected by a change of ownership. HCFA's relationship is with the provider, and HCFA is not precluded by changes of ownership from collecting monies due, including CMPs. HCFA need not concern itself with issues between present owners and previous owners. HCFA may well choose to collect all monies due from the provider's current resources.

Moreover, the finality of HCFA's administrative actions cannot be subject to such extrinsic factors as the timing of a sale of a skilled nursing facility. New owners cannot be permitted to "start over again" the orderly process by which HCFA maintains its contractual relationship with a provider. HCFA, through a provider agreement, has a contractual relationship with a provider, and changes of ownership alone do not show good cause to extend the time to file a hearing request.

2. Petitioner's failure to act does not constitute good cause.

Petitioner argues that, given its change in ownership, its decision to forward to Mr. Spencer all mail addressed to Hearthstone Care Center or to Mr. Spencer constitutes good cause for its late filing. I disagree. There is no affidavit from Mr. Stewart to establish when he became aware of the information contained in the HCFA notice letters dated October 5, 1995 and October 25, 1995. I do find that Mr. Stewart was sufficiently aware of HCFA's October 5, 1995 notice letter, or the basis for it, to have discussed the responsibility for payment of the CMP with the State Appointed Trustee, presumably before the Trustee left the facility on October 12, 1995. HCFA Ex. 9.

If Petitioner's personnel were failing to evaluate the mail and telefacsimiles to determine which items were of importance to Petitioner, and were instead forwarding all mail and facsimile transmissions to William Spencer's post office box (P. Ex. D), the negligence is Petitioner's.

Furthermore, even though the State Appointed Trustee and William Spencer both received HCFA's October 5, 1995 notice letter, neither party requested a hearing on Petitioner's part.[3] Petitioner's failure to take heed of and act upon information it received in letters and telefacsimiles sent to Petitioner as Hearthstone Care Center does not show good cause to extend the

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[3] The State Appointed Trustee gave the notice to Deborah Richmond to deliver to William Spencer, who was then Petitioner's owner and administrator. HCFA Ex. 9 at 3.

time to file a hearing request. This conclusion is in accord with the decision of Administrative Law Judge Steven Kessel in the case of Gilmer Care Center, Docket No. C-94-406, Order Dismissing Request For Hearing, (November 9, 1994).

3. Reliance on Trustee's advice does not constitute good cause.

Petitioner argues that the advice given to Mr. Stewart by the State Appointed Trustee (that "the owner of the facility at the time the penalties were incurred would be responsible for paying the fine" (HCFA Ex. 9 at 3)) constitutes an intervening event beyond the party's ability to control.

I disagree. The advice from the Trustee was merely one piece of information regarding the remedies imposed on Petitioner by HCFA. A reasonable person would have sought sufficient information to apprise himself more fully. It would have been reasonable, for example, to contact HCFA, the entity which imposed the CMP, for information regarding payment of the CMP. Reliance on the Trustee's advice does not show good cause to extend the time to file a hearing request. This conclusion is in accord with the decision in Hospicio San Martin, DAB CR387, aff'd DAB 1554.

4. New or renewed awareness that payment of the CMP was due does not constitute good cause.

HCFA's letter of April 3, 1996 (sent by HCFA to the Departmental Appeals Board as a part of Petitioner's April 4, 1996 hearing request) advises Petitioner: "As of the date of this letter, the total amount of the penalty plus interest due to HCFA is $140,574.16." Petitioner argues that "[o]nly $26,000 of the $136,000 CMP was accrued under Mr. Stewart's ownership" and that "[i]f HCFA intends to seek collection of these CMP's from Mr. Stewart, they (sic) only equitable outcome here is to find 'good cause' for late filing of this appeal, to combine this set of CMP's with the second set appealed on January 11, 1996, and to allow him a day in court to present these facts." P. Br. at 5 - 6.

I disagree. It was Mr. Stewart's responsibility to apprise himself of the condition of the skilled nursing facility he was purchasing, including its status with HCFA. The presence of the State Appointed Trustee was certainly evidence that the facility was troubled. Mr. Stewart should have been aware of the pending enforcement remedies.

Any apportionment or contribution or comparative responsibility for payment between William Spencer (Petitioner's owner until October 12, 1995), and Harold Stewart and other investors

(Petitioner's owner beginning October 12, 1995), is not for me to decide.[4]

Irrespective of actions that Mr. Stewart may take with regard to payment of the CMP, Petitioner's new or renewed awareness that payment of the CMP was due does not show good cause to extend the time to file a hearing request.

B. The second period of alleged noncompliance

Petitioner argues that Petitioner's attorney relied on representations made by TDHS Hearings Division personnel that any notices filed with the TDHS that should have been filed with HCFA would be forwarded to HCFA. Interestingly, in January 1996, Petitioner's attorney was very ably filing requests for hearing with the Departmental Appeals Board. Examples would include the requests for hearing in Docket Nos. C-96-092 (Oak Grove) and C-96-096 (Integrated), both pending before me. Petitioner's attorney's letter dated January 22, 1996 (in Docket No. C-96-096) includes the following paragraph:

> Also, an appeal request concerning these matters was already previously sent to the Texas Department of Human Services by letter dated January 16, 1996. It is my understanding that appeal request letter may be forwarded to your office. Consequently, this request may be duplicitous (sic) of that one, and is being sent in order to prevent any waiver of the facility's appeal rights.

The record does not establish when Petitioner forwarded HCFA's January 17, 1996 notice letter to Petitioner's attorney.

Petitioner asserts also that some confusion existed regarding the regulations governing skilled nursing facilities such as Petitioner, which had been in effect only about six months when HCFA imposed remedies against Petitioner. P. Br. at 8 - 9.

Given the clarity of the instructions in HCFA's January 17, 1996 notice letter concerning when and where to send Petitioner's hearing request, Petitioner's arguments are unpersuasive. While Petitioner argued in its brief that it might not have received the January 17, 1996 notice (P. Br. at 14), its stipulation

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[4] Perhaps the issue was addressed in the sales agreements. It may turn out that the State Appointed Trustee was correct when he opined that the owner of the facility at the time the penalties were incurred would be responsible for paying the fine. However, that is a matter between Mr. Stewart and Mr. Spencer, not a matter between Petitioner and HCFA.

asserts only that it does not have a record of the receipt date of HCFA's January 17, 1996 notice. Given the lack of any evidence to rebut the presumption that Petitioner did receive the notice via the U.S. Mail, I must assume that Petitioner received HCFA's January 17, 1996 notice letter by January 22, 1996. P. Stip., number 2.

Upon careful consideration, I conclude that Petitioner's filing with the TDHS does not show good cause to extend the time to file a hearing request. Petitioner was on notice that its hearing request should have been forwarded only to HCFA or to the Departmental Appeals Board.

CONCLUSION

Petitioner is not entitled to a hearing, as it did not timely file its hearing requests and has not shown good cause for extending the time to file its hearing requests. Therefore, I dismiss Petitioner's requests for hearing.

/s/

Jill S. Clifton

Administrative Law Judge