Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Heritage Park Rehabilitation and Nursing Center (CCN: 45-5599),	)	Date: NOV 12 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-648
	)	Decision No. CR 2028
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

For the reasons set forth below, I dismiss as untimely the hearing request filed by Petitioner, Heritage Park Rehabilitation and Nursing Center (hereafter Petitioner or facility).

I. Background

The following facts are not in dispute.

Petitioner, located in Austin, Texas, dually participates as a long-term care facility in the Medicare and Medicaid programs. On March 11, 2009, the Texas Department of Aging and Disability Services (TDADS) completed a complaint and incident investigation of Petitioner and cited substantial noncompliance with three Medicare participation requirements. Centers for Medicare & Medicaid Services (CMS) Motion to Dismiss at 1; Petitioner (P.) Response to Motion to Dismiss at 1. On April 7, 2009, CMS sent Petitioner a letter (CMS Notice Letter) notifying Petitioner that CMS concurred with TDADS's findings of substantial noncompliance. CMS Motion to Dismiss at 2; P. Response to Motion to Dismiss at 2. The CMS Notice Letter informed Petitioner of the remedies imposed as a result of the noncompliance and further advised Petitioner that if it disagreed with the determination of noncompliance, Petitioner could make a written request for a hearing to the Departmental Appeals Board "no later than June 6, 2009 (60 days from the date of the receipt of [the notice] letter via fax)." CMS Motion to Dismiss at 2; P. Response to Motion to Dismiss at 2. The letter also pointed out the procedural

rules governing the hearing process, 42 C.F.R. § 498.40 *et seq.*, and told Petitioner that its request for hearing should "identify the specific issues, and the findings of fact and conclusions of law" with which Petitioner disagrees and should specify the bases "for contending that the findings and conclusion are incorrect." CMS Ex. 1.

On June 17, 2009, CMS sent Petitioner a letter advising them that the deficiencies cited during the March 11 survey had been corrected and the facility had come back into substantial compliance. CMS indicated that the per instance CMP of $2000 was imposed on April 7, 2009 and remained in effect and that CMS was rescinding the proposed termination and denial of payment remedies. CMS further informed Petitioner that,

> Our records indicate that no appeal (or waiver of appeal rights) had been filed on your behalf regarding this action by June 6, 2009, the sixtieth day as referred to in the initial CMS letter for filing of appeals. . .Therefore, **the entire civil money penalty in the amount of $2,000.00 is due-and-payable on July 2, 2009**.

CMS Ex. 2 (June 17, 2009 CMS Letter) to Motion to Dismiss at 1; emphasis in original.

By letter dated August 6, 2009, Petitioner sent the Departmental Appeals Board a copy of the "Request for Formal Hearing," TDADS Form 3646, which was sent to TDADS Hearings Department. On August 12, 2009, the Civil Remedies Division acknowledged the receipt of Petitioner's letter and docketed this matter as C-09-648. On October 5, 2009, CMS filed this Motion to Dismiss arguing that under the applicable regulations Petitioner's hearing request is both untimely and does not meet the content requirements.[1] On October 26, 2009, Petitioner filed its response.

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[1] CMS accompanied its Motion and brief with two exhibits (CMS Ex. 1 and 2). Those exhibits are copies of the CMS notice letters and the fax transmissions for those letters. Petitioner submits its response to the Motion to Dismiss together with a Motion for Leave to File a Request for Hearing and Motion for Leave to Amend Request for Hearing together with seven exhibits (P. Exs. 1-7). P. Exs. 3 through 7 are documents relating to counsel for Petitioner's divorce proceedings. P. Ex. 1 and 2 are copies of the April 7 Notice Letter and Petitioner's August 6, 2009 request for hearing.

II. Discussion

A. Petitioner is not entitled to a hearing because it did not file a hearing request and no good cause justifies extending the time for filing.[2]

Petitioner does not dispute that its hearing request was untimely; Petitioner does not contest that the deadline for filing its hearing request was June 6, 2009.

Section 1866(h) of the Social Security Act authorizes administrative review of determinations that a provider fails to comply substantially with Medicare program requirements "to the same extent as is provided in section 205(b) [of the Act]." Under section 205(b), the Secretary must provide reasonable notice and opportunity for a hearing "upon request by [the affected party] who makes a showing in writing that his or her rights may be prejudiced" by the Secretary's decision. The hearing request "must be filed within sixty days" after receipt of the notice of CMS's determination (emphasis added). Act § 205(b). The 60 day time limit is thus a statutory requirement. *See Cary Health and Rehabilitation Center,* DAB No. 1771, at 8 - 9 (2001).

Similarly, the regulations mandate that "the affected party or its legal representative must file the request in writing within 60 days from receipt of the notice . . . unless that period is extended . . . ." 42 C.F.R. § 498.40(a). On motion of a party, or on his or her own motion, the 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). Under § 498.40(a)(2) 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, the language in CMS's notice letter is clear and unconditional: Petitioner's appeal had to be filed within 60 days of receipt, and, because the notice was sent by facsimile machine, it was, in fact, received on the date it was sent. Thus, to challenge the March 11, 2009 survey findings, Petitioner's hearing request had to be filed no later than June 6, 2009.

Both parties agree that Petitioner's August 6, 2009 hearing request was untimely. In fact, it was filed almost four months after receipt of the CMS Notice letter, and, absent a showing of good cause for my granting an extension of time in which to file it, it should be dismissed pursuant to 42 C.F.R. § 498.70.[3] Petitioner, however, contends that I should

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[2] My findings of fact and conclusions of law are set forth, in italics and bold, in the discussion captions.

[3] Not only was Petitioner's hearing request sent almost four months after Petitioner received CMS's April 7, 2009 Notice letter, it was also sent almost two months after CMS's letter dated June 17, 2009 to Petitioner. That letter demanded payment of the CMP of $2000 because no appeal had been filed by the June 6 deadline and the

grant an extension of time for the filing of the hearing request for good cause shown for its failure. P. Response to Motion to Dismiss at 2. Petitioner acknowledges that "good cause" has been interpreted under the case law to mean circumstances beyond a party's control which intervened to prevent the party from making a timely hearing request. *See Hospicio San Martin*, DAB CR387 (1995), *aff'd* DAB No. 1554 (1996). P. Response to Motion to Dismiss at 2. Petitioner claims that at the time the CMS notice letter was received by Petitioner and forwarded to its Attorney (Romano), Attorney Romano was in the midst of his own personal divorce proceedings and the events of that proceeding distracted Petitioner's counsel from filing the request for hearing by the requisite deadline. Petitioner, therefore, contends that the "personal life events" of its attorney were beyond the ability of Petitioner to control and should therefore constitute good cause so that I may grant an extension of time for filing the hearing request. P. Response to Motion to Dismiss at 2-3.

I disagree. I have reviewed the undisputed facts and find that Petitioner's reasons do not constitute good cause under any reasonable definition of that term. Attorney Romano's failure was not beyond Petitioner's ability to control. Rather, the failure of Petitioner's attorney to meet the clear and unambiguous filing deadline constitutes avoidable human error. Petitioner could have filed the hearing request without counsel but it chose to be represented by counsel and chose its attorney. It received CMS's notice letter and knew the filing deadline, and it could have had some oversight over its attorney. Moreover, Petitioner clearly had notice that an appeal had not been filed by the requisite deadline when it received the June 17 letter from CMS. Instead of immediately contacting CMS and this office, Petitioner did nothing. Moreover, it still entrusted its attorney, who did not timely file the appeal in the first instance, and that attorney took another two months before filing the hearing request.

The applicable regulations do not define "good cause" but leave that determination to the discretion of the ALJ. Looking to regulations governing certain Social Security benefit appeals for guidance, many ALJs have ruled that "good cause" means circumstances beyond a party's ability to control. *See, e.g., Hillcrest Healthcare, L.L.C.*, DAB CR976 (2002), *aff'd* DAB No. 1879 (2003); *Hammonds Lane Center, et al.*, DAB CR913 (2002), *aff'd* DAB No. 1853 (2002); *Glen Rose Medical Center*, DAB CR918 (2002), *aff'd*, DAB No. 1852 (2002); *Parkview Care Center*, DAB CR785 (2001); *Hospicio San Martin*, DAB CR387 (1995), *aff'd*, DAB No. 1554 (1996); 20 C.F.R. § 404.911; 20 C.F.R. § 404.933(c).[4] My determination that Attorney Romano's failure is not good cause is

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amount of the CMP, therefore, was due and payable to CMS. Even after it received the June 17 letter, Petitioner still did not file a hearing request for 50 more days and made no attempt to contact CMS or the Departmental Appeals Board.

[4] Under those regulations, to determine whether good cause exists, the ALJ considers 1) the circumstances that kept Respondent from making the request on time; 2) whether any SSA action misled him; 3) whether Respondent understood the requirements

supported and consistent with other decisions that found that an attorney's failure to meet a filing deadline is avoidable human error and not "good cause." Nelson Ramirez-Gonzalez, DAB CR175 (1992); Bruce Franklin, R. Ph., DAB CR1198 (2004); Community Care Center of Seymour, DAB CR758 (2001); Sedgewick Health Care Center, DAB CR596 (1998); Jackson Manor Health Care, Inc., DAB CR545 (1998); see also Karen Kay Parham, DAB CR1600 (2007), aff'd App. Div. Dkt. No. A-07-109 (2007).

III. Conclusion

Because Petitioner did not timely file its hearing request, and no good cause justifies extending the time for filing, I grant CMS's motion and order this case dismissed. 42 C.F.R. § 498.70(b).

/s/ Alfonso J. Montaño
Administrative Law Judge

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for filing; and 4) whether Respondent had any physical, mental, educational, or linguistic limitation that prevented him from filing a timely request, or from understanding or knowing about the need to file a timely request for review. 20 C.F.R. § 404.911. Here, there were no circumstances that kept Petitioner from making a timely request; there was no CMS action that was misleading; the requirements for filing were clear and unambiguous; and since Petitioner is an entity, there were no physical, and mental limitations that prevented a timely filing.