Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Rutland Nursing Home
Docket No. A-14-32
Decision No. 2582
June 30, 2014

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE ORDER

Rutland Nursing Home (Rutland, Petitioner) appeals an Administrative Law Judge's Order of Dismissal dismissing Rutland's request for a hearing as untimely and concluding that there was no good cause to extend the time for filing the request. *Rutland Nursing Home*, ALJ Ruling No. 2014-12 (Nov. 8, 2013) (ALJ Order). For the reasons explained below, we sustain the ALJ Order.

Legal authority

Federal statutes and regulations provide for CMS and state agencies to survey nursing facilities to evaluate their compliance with the requirements for participation in the Medicare program and to impose remedies on facilities not in substantial compliance with those requirements. Section 1819 of the Social Security Act (Act); 42 C.F.R. Parts 483, 488, 498.[1] Survey findings are reported in a statement of deficiencies (SOD) that identifies each deficiency under its regulatory requirement. CMS imposes remedies based on the scope and severity of deficiencies, i.e., whether a deficiency has created a "potential for" harm, resulted in "[a]ctual harm," or placed residents in "immediate jeopardy," and whether a deficiency is "isolated," constitutes a "pattern," or is "widespread." 42 C.F.R. § 488.404. CMS in its State Operations Manual assigns a letter to each level of scope and severity with (as relevant here) "G" meaning an isolated deficiency that constitutes "actual harm that is not immediate jeopardy," and "D" meaning an isolated deficiency that constitutes "no actual harm with a potential for more than minimal harm that is not immediate jeopardy." SOM, CMS Pub. 100-07, Ch. 7, § 7400.5.1 (available at http://www.cms.hhs.gov/Manuals/IOM/list.asp).

[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

Section 1866(h)(1) of the Act and 42 C.F.R. Part 498 permit facilities to challenge, in an ALJ hearing, specified "initial determinations" resulting from surveys. The "initial determinations" by CMS that facilities may appeal include, as relevant here, "a finding of noncompliance that results in the imposition of a remedy specified in section 488.406 of this chapter, except the State monitoring remedy." 42 C.F.R. § 498.3(b)(13) (2011);[2] *see also* 42 C.F.R. 488.408(g) ("[a] facility may appeal a certification of noncompliance leading to an enforcement remedy."). Among the remedies specified in section 488.406 is the remedy CMS imposed here, a denial of payment for all new admissions (DPNA). 42 C.F.R. § 488.406(a)(2)(ii). CMS may impose a DPNA whenever a facility is not in substantial compliance. Act § 1819(h)(2)(B)(i); 42 C.F.R. § 488.417(a).

A facility wishing to challenge a CMS initial determination must request an ALJ hearing within 60 days of receiving the notice of that initial determination. 42 C.F.R. § 498.40(a)(2). The ALJ may extend the time for filing a hearing request "[f]or good cause shown." 42 C.F.R. § 498.40(c). An ALJ may dismiss a hearing request where the request was not timely filed and the time for filing was not extended. 42 C.F.R. § 498.70(c).

The applicable regulations also provide that a facility may ask to participate in an informal dispute resolution (IDR) process to dispute any survey findings. 42 C.F.R. § 488.331(a).

Standard of Review

The Board reviews a disputed finding of fact to determine whether the finding is supported by substantial evidence on the record as a whole, and a disputed conclusion of law to determine whether it is erroneous. *See Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs*, http://www.hhs.gov/dab/divisions/appellate/guidelines/prov.html. "The standard of review for an ALJ's exercise of discretion to dismiss a hearing request where such dismissal is committed by regulation to the discretion of the ALJ is whether the discretion has been abused." *High Tech Home Health, Inc.*, DAB No. 2105, at 7-8 (2007), *aff'd*, *High Tech Home Health, Inc. v. Leavitt*, Civ. No. 07-80940 (S.D. Fla. Aug. 15, 2008).

[2] Section 498.3(b)(13) was revised effective July 1, 2013 and now states that initial determinations include "the finding of noncompliance leading to the imposition of enforcement actions specified in § 488.406 or § 488.740 of this chapter, but not the determination as to which sanction was imposed. The scope of review on the imposition of a civil money penalty is specified in § 488.438(e) of this chapter." 77 Fed. Reg. 67,068, 67,170 (Nov. 8, 2012).

Background

The following background facts are undisputed and are taken from the ALJ Order and the record before the ALJ.

Rutland is a long-term care facility in Brooklyn, New York that participates in the Medicare program. The New York State Department of Health (NYSDOH, state agency) surveyed Rutland on February 23, 2012 and determined that Rutland was not in substantial compliance with 19 requirements found or referenced in the Medicare regulations for nursing facilities at 42 C.F.R. Part 483. CMS Ex. 2. As relevant to this appeal, the state agency determined that one deficiency, noncompliance with the requirement, at 42 C.F.R. § 483.25(i), that a facility ensure that a resident maintains acceptable parameters of nutritional status, was at a "G" level of scope and severity, meaning an isolated deficiency that constitutes actual harm that is not immediate jeopardy. SOM Ch. 7, § 7400.5.1. The other deficiencies were at the "D" or "E" levels, meaning isolated or pattern deficiencies resulting in no actual harm with potential for more than minimal harm that is not immediate jeopardy. *Id*. The state agency by letter dated April 11, 2012 sent Rutland the SOD and told Rutland that the state agency was recommending that CMS impose a DPNA and that Rutland could request IDR from the state to dispute the deficiencies. P. Ex. E.

CMS notified Rutland by letter dated and faxed April 13, 2012 that based on the survey on February 23, 2012, CMS had determined that Rutland was not in substantial compliance with Medicare participation requirements. CMS Ex. 3 (CMS notice letter). The CMS notice letter stated that Rutland's Medicare provider agreement would terminate on August 23, 2012 if all deficiencies were not corrected by then, and that CMS was imposing a DPNA beginning April 28, 2012 and continuing until Rutland returned to substantial compliance. The CMS notice letter also informed Rutland that if it disagreed with CMS's determination, it could request a hearing before an ALJ within 60 days of its receipt of the letter; i.e., by June 12, 2012. *Id*.; ALJ Order at 3.

On April 27, 2012, Rutland requested IDR from the state agency with respect to the one "G" level deficiency. The state agency, by letter dated October 23, 2012, notified Rutland that "[t]he [IDR] review did not change the deficiency [which] remains as written on the original Statement of Deficiencies" (i.e., at the "G" level of scope and severity). P. Ex. B, at 1.

Rutland requested an ALJ hearing by letter dated December 20, 2012. CMS filed a motion to dismiss Rutland's hearing request as untimely, Rutland submitted a response, and CMS submitted a reply. Each party submitted exhibits which the ALJ admitted absent any objection. The ALJ granted CMS's motion to dismiss, ruling that Rutland

"did not file a timely hearing request, and no good cause justifies extending the time for filing" a hearing request. ALJ Order at 3-6. The ALJ also denied Rutland's request for discovery of correspondence between the state agency and CMS regarding the IDR process.

The record before us consists of the record before the ALJ, the parties' briefs on appeal to the Board, and the transcript of an oral argument the Board convened at Rutland's request on April 16, 2014.

Analysis

Rutland acknowledges that it did not request an ALJ hearing within 60 days of April 13, 2012, when it received the CMS notice letter regarding the results of the February 23, 2012 survey. RR at 2, 9. Rutland first requested an ALJ hearing by letter dated December 20, 2012, or 251 days after its receipt of the CMS notice letter. Thus, its hearing request was untimely under the regulations. 42 C.F.R. § 498.40(a)(2); *see also* § 498.40(c)(1) (permitting "request for extension of time stating the reasons why the request [for hearing] was not filed timely"); ALJ Order at 3, 4, 6. Rutland asserts that CMS's alleged rejection of the state agency's IDR recommendation "constitutes another initial determination of a finding of noncompliance … which provides an independent basis of timeliness for Rutland's Hearing Request." RR at 3. Rutland also argues that there was good cause to extend the filing deadline, alleging that CMS's notice letter lacked adequate information about the ALJ hearing and IDR processes and that "unique facts" surrounding CMS's alleged rejection of what Rutland understood to be a state agency IDR recommendation to reduce the scope and severity of the "G" level deficiency. RR at 9, 15. Rutland argues, as it did before the ALJ, that the absence from the CMS notice letter of "a clear warning that an informal resolution process does not constitute a formal appeal … constitutes 'good cause' to extend the deadline for Rutland to file its request for a hearing" before an ALJ. Finally, Rutland argues that CMS's alleged rejection of the state IDR recommendation constitutes good cause for extending the 60-day period for requesting an ALJ hearing. RR at 15.

As we explain below, none of these arguments have any merit.

A. The state agency's IDR determination was not an "initial determination" to which the 60-day time period for requesting an ALJ hearing applied.

Rutland argues that the state agency's October 23, 2012 letter informing Rutland that IDR had not changed the scope and severity level of the "G" level deficiency constitutes an appealable initial determination such that Rutland's December 20, 2012 hearing request was in fact timely. Rutland points out, for instance, that it filed its December 20, 2012 request for an ALJ hearing "within 60 days of NYSDOH's written decision" of

October 23, 2012. RR at 3; *see also* P. Reply at 3 (after receiving the state agency' October 23, 2012 letter, "Rutland properly challenged the NYSDOH's finding in its December 20, 2012 Hearing Request").

Under the regulations providing for ALJ hearings, however, the state agency's October 23, 2012 letter informing Rutland of the unfavorable IDR outcome was not an "initial determination" that triggered the right to an ALJ hearing because it was not a determination issued by CMS. Part 498 of 42 C.F.R. "sets forth procedures for reviewing initial determinations that CMS makes with respect to the matters specified" in the regulations, including "a finding of noncompliance that results in the imposition of a remedy specified in § 488.406 of this chapter," which includes a DPNA, the remedy CMS imposed here. 42 C.F.R. § 498.3(a) (emphasis added), 498.3(b)(13). Neither a State agency IDR determination nor CMS's acceptance or rejection of that determination is listed as an initial determination. Thus, in *Capitol House Nursing & Rehab. Ctr.*, DAB No. 2252 (2009), the Board held that "the regulations provide that a [Medicare] provider may appeal only an initial determination made by CMS" and that "[t]he IDR result from [the state agency] is not an administrative action by CMS that may be appealed to an ALJ." DAB No. 2252, at 5, citing 42 C.F.R. §§ 498.3(b)(13), 498.3(d), 498.40(a) and *High Tech Home Health, Inc*. As the ALJ stated, "[t]he regulations provide that a provider may appeal only an initial determination of CMS." ALJ Order at 4. Here, the CMS notice letter dated and received by Rutland on April 13, 2012 was CMS's "initial determination" that triggered Rutland's time-limited right to request an ALJ hearing. The state agency's October 23, 2012 letter informing Rutland of the IDR results was not an initial determination and, therefore, did not trigger a new 60-day period for requesting an ALJ hearing.

B. Rutland's participation in the state IDR process did not constitute good cause for extending the 60-day time period for requesting an ALJ hearing.

It is well recognized that the Board has never attempted to provide an authoritative or complete definition of the term "good cause" in section 498.40(c)(2). *See Kids Med (Delta Medical Branch)*, DAB No. 2471, at 6 (2012) citing *Brookside Rehab. & Care Ctr.*, DAB No. 2094, at 7 n.7 (2007); *Wesley Long Nursing Ctr., Inc.*, DAB No. 1937, at 9 n.7 (2004); *Hillcrest Healthcare, L.L.C.*, DAB No. 1879, at 5 (2003). The ALJ noted that although the Board has not reached the issue of whether "good cause" is limited to circumstances beyond a party's ability to control, "the Board has consistently ruled that where, as here, a party consciously chooses for reasons of its own not to request a hearing, it must accept the consequences of its inaction." ALJ Order at 4-5 (citations omitted). Here, we need not decide the precise scope of "good cause" because Rutland failed to establish "good cause" for extending the filing deadline, under any reasonable definition of that term.

The ALJ stated, and the Board has held, that requesting or participating in a state IDR does not toll the regulatory deadline for requesting an ALJ hearing or constitute good cause for failing to timely request an ALJ hearing. ALJ Order at 5; *Quality Total Care, L.L.C., d/b/a The Crossings,* DAB No. 2242, at 10 (2009) (citations omitted) ("the Board has previously held that participation in an IDR does not, in itself, excuse a failure to timely file" a request for an ALJ hearing); *Cary Health & Rehab Ctr.*, DAB No. 1771, at 28 (2001) ("[p]articipation in a State informal dispute resolution (IDR) does not toll the federal appeal process"). The Board has also held that the state IDR process is separate from and in addition to the appeal rights provided to facilities under federal regulations and does not affect CMS's initial determination unless CMS determines to reopen or revise the initial determination. *Concourse Nursing Home*, DAB No. 1856, at 8-10 (2002) (citations omitted), *aff'd, Concourse Rehab. & Nursing Ctr. v. Thompson*, No. 03 Civ.260 (NRB), 2004 WL 434434 (S.D.N.Y. Mar. 8, 2004), *aff'd*, 155 F. App'x 28 (2nd Cir. 2005). Rutland on appeal concedes that using the state IDR process does not, by itself, toll the deadline for requesting an ALJ hearing. Oral Argument Transcript (Tr.) at 9 ("[w]e're not saying that the IDR process necessarily tolls the time limit to file a request for hearing"), 10 ("[w]e're not saying the IDR tolls the deadline").

The record here indicates that Rutland's failure to request timely an ALJ hearing was a conscious litigation decision by Rutland to instead use the state's IDR process in hopes of reducing the scope and severity of one of the 19 deficiencies found in the survey. Rutland counters that it was "under the impression (fostered by NYSDOH) that its IDR challenge had been successful, [and therefore] Rutland reasonably believed that NYSDOH was simply awaiting CMS's concurrence on the IDR recommendation prior to issuing its written decision" on the results of the IDR. RR at 2. This statement supports the conclusion that Rutland was unconcerned over the passing of the deadline for requesting an ALJ hearing because it anticipated that IDR would lower the scope and severity of one deficiency.

In oral argument before the Board, Rutland further suggested that it knowingly declined to request an ALJ hearing as a matter of expense, arguing that it "cannot be the law" that "[y]ou should have from day one gone through the additional expense and resources of simultaneously pursuing a hearing and appeal." Tr. at 12. There is no merit to this argument. As already discussed, the law requires that a request for hearing be filed within 60 days of receiving the notice of CMS's initial determination to impose remedies based on findings of noncompliance, and the law makes no exception where a facility chooses to pursue IDR rather than file a hearing request. Moreover, the Board has rejected similar efficiency or cost-based arguments. *See Concourse Nursing Home* at 11 (noting that the competing interests that IDR "may narrow disputed issues and/or avoid the need for a more formal hearing" but "not be used to delay enforcement … can be accommodated by granting reasonable but short delays of ALJ proceedings where it appears IDR might be productive, after a timely appeal has been filed") (emphasis in original); *see also Hillcrest Healthcare, L.L.C.* at 7 ("by inadvertence or tactical choice,

Hillcrest elected, at least initially, to resolve its dispute by means other than a formal administrative hearing [and with] that election came the possibility that the time for filing a hearing request … would expire before Hillcrest could predict or know the outcome of the IDR process").

Rutland also complains about the length of time the state agency took to issue its IDR determination. *See* RR at 4 (state agency "delayed issuing its IDR decision to Rutland for four and a half months"). Rutland cites to state guidance providing that "IDR Panel review will occur no more than 45 calendar days following receipt of the facility's packet," but that guidance does not require the IDR panel to complete its review or issue its decision at that time. *Id.*, citing P. Ex. G, at 1. Nor could the panel ensure such timing because the guidance also states that the panel decision will be communicated to the facility only "once [CMS] concurs." P. Ex. G, at 1. Rutland reports filing its IDR request on April 27, 2012, meaning that, according to the state IDR guidance, the review was to occur no later than June 11, 2012, only one day before the deadline for requesting an ALJ hearing on CMS's noncompliance determination. RR at 4; Ex. A to Rutland Request for ALJ Hearing (RFH). Thus, Rutland's suggestion that it expected that the IDR process would have been completed in sufficient time for Rutland to request a hearing before an ALJ if it was dissatisfied with the IDR results is not credible. Accordingly, the fact that the IDR process was completed after the 60-day period for requesting an ALJ hearing does not constitute good cause for extending that period. *See also* 42 C.F.R. § 488.331(b)(1) (failure of state to complete IDR timely "cannot delay the effective date of any enforcement action against the facility").

C. <u>The CMS notice letter was neither unclear nor defective and did not furnish good cause for extending the 60-day period for requesting an ALJ hearing.</u>

Rutland argues, as it did before the ALJ, that the absence from the CMS notice letter of "a clear warning that an informal resolution process does not constitute a formal appeal … constitutes 'good cause' to extend the deadline for Rutland to file its request for a hearing" before an ALJ. RR at 15; ALJ Order at 6. Rutland argues that the notice letter "did not clearly explain that: (i) the IDR process and ALJ hearing are separate and unrelated procedures; (ii) the filing of an IDR submission does not also constitute a request for an ALJ hearing; and (iii) an IDR submission does not preserve a facility's right to appeal." RR at 14. Rutland argues that "[t]he utter lack of clarity (and corresponding confusion) regarding NYSDOH's April 11th letter and CMS's April 13th letter contributed to its failure to file contemporaneously both an IDR submission with NYSDOH and a request for a hearing before the Civil Remedies Division[.]" RR at 13. Rutland asserts that in general, CMS notice letters "do not clearly notify facility administrators of their appeal rights, and have caused many facilities to miss the deadline

to file a request for a hearing when an IDR is pursued." RR at 14. Rutland argues that this lack of clarity is shown by ALJ and Board decisions involving allegations that "facilities . . . have misunderstood the impact of the IDR process on their right to request a hearing before an ALJ." *Id*., referring to decisions enclosed with its hearing request.

We agree with the ALJ that the CMS notice letter was "clear and unambiguous" in informing Rutland how to request an ALJ hearing and of the deadline for doing so. ALJ Order at 6. The CMS notice letter, in a section with the bold heading "**APPEAL RIGHTS**," stated:

> If you disagree with this determination, you or your legal representative may request a hearing before an Administrative Law Judge of the Department of Health and Human Services, Departmental Appeals Board. Procedures governing this process are set out in 42 CFR 498.40, et seq. A written request for a hearing must be filed no later than 60 days from the date of receipt of this letter.

P. Ex. F at 2. The notice letter cited 42 C.F.R. § 498.40 which, consistent with the letter, states that the party seeking the hearing "must file the request in writing within 60 days from receipt of the notice of initial, reconsidered, or revised determination unless that period is extended in accordance with paragraph (c) of this section." 42 C.F.R. § 498.40(a)(2); *see* ALJ Order at 6 ("the regulatory timeframe to file a hearing request is clear and detailed in the CMS April 2012 letter."). The CMS notice letter thus communicated to Rutland in plain, unmistakable terms how it could request an ALJ hearing to appeal the determination to impose a DPNA and the deadline for doing so.

The Board has previously held that the language CMS used in its notice letter (or similar language) adequately notifies facilities of the requirement to request a hearing within the 60-day regulatory time frame such as to support a motion to dismiss an untimely hearing request. For example, in *Concourse Nursing Home*, the Board held that a CMS letter containing the same language as the letter here "set forth the clear and unambiguous regulatory requirements for filing such a request for hearing" and "was not defective and explicitly provided Concourse with a definitive time frame in which to request a hearing." DAB No. 1856, at 3, 10, 11. In affirming the Board's decision, the U.S. district court stated that the CMS notice letter was "perfectly clear" and provided the facility "clear notice of the enforcement action pending against it, the basis for this action … and [the facility's] right to appeal the action to HHS within 60 days." *Concourse Rehab. & Nursing Ctr. v. Thompson* at 3-4.

In *Quality Total Care*, the Board observed that very similar language in a CMS notice letter ("**A written request for a hearing must be filed no later than sixty days from the date of receipt of this letter**") "clearly told [the facility] that, under section 498.40, it was required to submit any hearing request within 60 days of its receipt of the notice."

DAB No. 2242, at 6 (bold in original); *see also Mimiya Hosp.*, DAB No. 1833, at 4, 6 (2002), *aff'd, Mimiya Hosp., Inc. SNF v. U.S. Dep`t of Health & Human Servs.*, 331 F.3d 178 (1st Cir. 2003) (CMS letter stating that "[a] written request for a hearing must be filed no later than 60 days from the date of receipt of this letter" contained "explicit directions" on how to seek review of CMS's determination); *Waterfront Terrace, Inc.*, DAB No. 2320, at 3, 6 (2010) (agreeing with ALJ that "any reasonable person – even a 'lay person'" receiving notice stating that "[i]n order to be granted a hearing … the facility must file a written request for a hearing within 60 days from the receipt of this notice" would know that to perfect an appeal the provider must do exactly what that language stated).

Rutland's argument provides no basis for us to reach a different conclusion here. Rutland has not established that the absence of information about the effect of requesting IDR could reasonably lead a recipient of the CMS notice letter to believe it could request an ALJ hearing by any means other than following the letter's clear instructions on how to request an ALJ hearing and the deadline for doing so. The CMS notice letter does not reference the state's IDR process and nothing in that letter or the regulation indicates that Rutland could preserve its right to a hearing in any manner other than as stated therein, i.e., by filing a request for an ALJ hearing within 60 days after receipt. *See, e.g., Nursing Inn of Menlo Park*, DAB No. 1812, at 7 (2002) ("[t]here was nothing in the notice to the effect that some other action by Nursing Inn, be it engaging in the IDR process or preparing a plan of correction to submit to the State survey agency, would stay the imposition of the remedies or the 60-day deadline for requesting a hearing."); *see also Concourse Rehab. & Nursing Ctr. v. Thompson* at 3 ("[t]here was no reason for [the facility] to believe either that this course [requesting IDR] was necessary or that it would preserve its right of appeal to an HHS ALJ.").

The ALJ and Board decisions Rutland references only underscore the consistency of the Board's prior conclusions upholding the adequacy of CMS notice letters. Rutland does not allege that any of the ALJ decisions found good cause to extend the deadline to request a hearing, and the Board decisions (*Quality Total Care*, *Concourse Nursing Home, Hillcrest Healthcare, L.L.C.*, *Nursing Inn of Menlo Park*) all sustained ALJ dismissals of the hearing requests as untimely and found that the facilities had clear notice of their right to request a hearing and the deadline for making such a request.[3]

In short, the language in CMS's notice letter gave plain notice of the need to file a timely appeal in order to preserve appeal rights. Moreover, the record undermines Rutland's undocumented assertion that it was misled by the CMS notice letter. Rutland proffered no evidence that anyone authorized to request an ALJ hearing on its behalf was confused

[3] In any case, it is well established that ALJ decisions are not binding precedent on the Board or other ALJs. *See, e.g., Raymond Lamont Shoemaker*, DAB No. 2560, at 5 (2014) citing *Michael D. Dinkel*, DAB No. 2445 (2012), and *Mark B. Kabins, M.D.*, DAB No. 2410 (2011).

by the contents of the letters from CMS and the state agency or failed to timely request an ALJ hearing based on such confusion. Indeed, the affidavit testimony of Rutland's administrator and a consultant about the details of their communications with state agency representatives officials during October and November 2012 regarding Rutland's IDR request does not even reference the ALJ hearing process. P. Exs. A, C. This case is thus similar to *Waterfront Terrace, Inc*. at 8, where the Board stated that "if Waterfront had reasonably been confused about the meaning of the April [notice] letter at that time, then it is also reasonable to expect some evidence or conduct manifesting such confusion" and pointed out that the facility "provides no declaration or other evidence claiming that it had any alternative understanding of the notice" of the requirement to file a written request for a hearing within 60 days (emphasis in original).

In addition, Rutland's two April 27, 2012 letters to different state agency offices requesting IDR do not contain any reference to an ALJ hearing and nothing in those letters may reasonably be construed as a request for an ALJ hearing or as evincing a belief that requesting IDR would preserve the right an ALJ hearing. RFH Ex. A. Finally, as discussed above, the record indicates that Rutland decided not request an ALJ hearing to spare the cost of pursuing the ALJ hearing process and because it believed that IDR would succeed in lowering the scope and severity level of one deficiency.

Thus, the discussed evidence in the record undermines Rutland's undocumented assertion that it was misled by the CMS notice letter into believing that its IDR request preserved the right to an ALJ hearing or tolled the deadline for requesting one.

D. Whether CMS rejected the state IDR recommendation had no bearing on whether there was good cause for extending the 60-day period for requesting an ALJ hearing, and any such rejection was not an initial determination to which the 60-day time period applied.

Rutland argues that there is good cause to accept its untimely hearing request so that Rutland may use the ALJ hearing process to investigate, through discovery, whether "CMS rejected NYSDOH's recommendation [to lower the scope and severity level of one deficiency] in an arbitrary and capricious manner[.]" RR at 13. Rutland proffered testimony of its administrator and a consultant to the effect that in October 2012, state agency officials reported that "on or about July 17, 2012," they had recommended to CMS "that Rutland's Deficiency be reduced from a scope and severity level G to level D." RR at 4-5, 6. Instead, "much to Rutland's surprise," the state agency in its October 23, 2012 letter informed Rutland that IDR had not changed the level of scope and severity of the "G" level deficiency. RR at 2, 5. Rutland argues that "it is an abuse of discretion for the ALJ to render a decision on the presence (or absence) of good cause until such time as the ALJ has fully reviewed and considered the documents and correspondence exchanged by NYSDOH and CMS" concerning the state agency's recommendation. RR at 13. Alternately, Rutland argues that "CMS's rejection of

NYSDOH's favorable recommendation constitutes another initial determination of a finding of noncompliance with respect to Rutland's IDR challenge, which provides an independent basis of timeliness for Rutland's Hearing Request." RR at 3.

The ALJ denied Rutland's request for discovery, and rejected its argument that discovery might uncover good cause, on the basis that "any state IDR recommendation, or CMS's rejection of it" was "not relevant to the issue of the timeliness of Petitioner's hearing request." ALJ Order at 6. The ALJ's determination was legally correct. In fact, the Board has recognized that, beyond the timeliness issue, CMS's rejection of IDR results has no relevance at all to an ALJ's de novo review of a CMS "finding of noncompliance that results in the imposition of a remedy." 42 C.F.R. § 498.3(b)(13). In *Britthaven of Chapel Hill*, DAB No. 2284 (2009), the Board held that the issue of whether CMS had authority to reject the state agency's IDR determination that a deficiency did not pose immediate jeopardy was irrelevant to the ALJ's review because "[t]he ALJ was not reviewing CMS's conclusions about the IDR findings but, rather, was reviewing the facts before her on the record to determine de novo whether Petitioner was in substantial compliance." DAB No. 2284, at 6. The Board cited decisions stating that "an ALJ hearing is not a 'review of how or why CMS decided to impose remedies'" but instead "provides a fresh look by a neutral decision-maker at the legal and factual basis for the deficiency findings underlying the remedies." *Id.*, citing *Beechwood Sanitarium*, DAB No. 1906, at 28-29 (2004), *modified on other grounds, Beechwood v. Thompson*, 494 F. Supp. 2d 181 (W.D.N.Y. 2007), and *Sunbridge Care & Rehab. for Pembroke*, DAB No. 2170, at 26-27 (2008) (holding that ALJ review is de novo), *aff'd, Sunbridge Care & Rehab. for Pembroke v. Leavitt*, 340 F. App'x 929 (4th Cir. 2009).

Thus, CMS's rejection of a state agency IDR recommendation to reduce the scope and severity level of one deficiency, if it occurred, would not constitute good cause to accept Rutland's untimely request for an ALJ hearing. CMS's alleged rejection of the state agency's IDR recommendation also would not constitute another appealable initial determination, as Rutland contends. As previously discussed, the CMS "initial determinations" listed in section 498.3 that give rise to the right to an ALJ hearing do not include a decision to accept or reject state IDR findings. The only CMS initial determination listed in the regulation that is present here is a finding of noncompliance that results in the imposition of a remedy such as a DPNA. 42 C.F.R. § 498.3(b)(13). Here, that determination was CMS's notice letter of April 13, 2012 finding noncompliance and imposing the remedy of a DPNA. CMS's alleged rejection, some seven months later, of an IDR recommendation to reduce the scope and severity of one deficiency did not alter that determination or take any action that constituted an initial determination under the regulations.

Conclusion

For the reasons explained above, we uphold the ALJ Order and affirm and adopt the ALJ's findings of fact and conclusions of law.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member