Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Lakeview Manor Nursing Home,	)	
	)	Date: January 24, 2006
Petitioner,	)	
	)	
v.	)	Docket No. C-06-37
	)	Decision No. CR1395
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

The October 25, 2005 request for hearing of Petitioner, Lakeview Manor Nursing Home is dismissed pursuant to42 C.F.R. § 498.70(b) and (c). The request for hearing was not timely filed; Petitioner has not shown good cause for an extension of time within which to file its request for hearing; and, even if there was good cause for not dismissing the request for hearing, it raises no justiciable controversy.

I. Background

Petitioner, located in New Roads, Louisiana, is certified to participate in the Medicare program as a skilled nursing facility (SNF) and the state Medicaid program as a nursing facility (NF). The Louisiana Department of Health and Hospitals (the state agency) completed a Life Safety Code and Standard Health Survey of Petitioner's facility on May 26, 2005. The state agency advised Petitioner by letter dated June 9, 2005, that it was in violation of federal and state participation requirements and that a denial of payment for new admissions (DPNA) would be effective August 26, 2005, if substantial compliance was not achieved prior to that date, and that Petitioner's provider agreement was subject to termination. The state agency also advised in its letter that Petitioner had until August 18, 2005, to file a request for hearing by an administrative law judge (ALJ). By letter dated June 30, 2005, Petitioner requested informal dispute resolution (IDR) through the state agency. Exhibit C attached to Petitioner's Request for Extension of Time to Request Hearing Due to Hardships Imposed by Hurricane Katrina (Request for Hearing). The

state agency advised Petitioner of the results of the IDR by letter dated August 16, 2005, which letter indicates that IDR resulted in two of seven of the challenged deficiencies being deleted. Exhibit A to Request for Hearing. Petitioner requested a hearing and an extension of time for filing that request by letter dated October 25, 2005.

On December 2, 2005, the Centers for Medicare & Medicaid Services (CMS) moved that I dismiss Petitioner's request for hearing on two separate grounds: (1) that Petitioner's request for hearing was not timely filed and that Petitioner has not shown good cause for an extension of time in which to file; and (2) that Petitioner has not requested review of three of the five deficiencies remaining after IDR. CMS Memorandum in Support of Respondent's Motion to Deny Petitioner's Request for an Extension and Motion to Dismiss (CMS Motion) at 1.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the parties pleadings and documents submitted in support thereof.

1. The state agency advised Petitioner by letter dated June 9, 2005, that it was in violation of federal and state participation requirements and that a denial of payment for new admissions would be effective August 26, 2005, if substantial compliance was not achieved prior to that date, and that Petitioner's provider agreement was subject to termination.

2. Petitioner received the June 9, 2005, state agency notice of initial determination on June 20, 2005.

3. By letter dated June 30, 2005, Petitioner requested informal dispute resolution through the state agency, challenging some of the deficiencies cited by the state agency.

4. The state agency advised Petitioner of the IDR results by letter dated August 16, 2005.

5. Petitioner's 60-day period for requesting a hearing expired on August 19, 2005, counting from Petitioner's June 20, 2005 receipt of the state agency notice of initial determination.

6. Petitioner requested a hearing and an extension of time for filing that request by letter dated October 25, 2005.

7. Petitioner's counsel's evacuation from New Orleans due to Hurricane Katrina did not occur until seven days after the 60-day period for requesting a hearing had already expired.

8. Petitioner's counsel's evacuation from New Orleans due to Hurricane Katrina did not occur until eight days after Petitioner received the IDR results on August 18, 2005.

9. The surveyors cited Petitioner with violations of federal participation requirements under 42 C.F.R. § 483.10(d)(3) Tag F164), at a scope and severity level (s/s) of D; § 483.20(b) (Tag F272), s/s D; § 483.20(k) (Tag F279), s/s D; § 483.20(k) (2) (Tag F280), s/s E; § 483.25(d)(1) (Tag F315), s/s D; § 483.25(h)(2) (Tag F324), s/s G; § 483.35(e) (Tag F367), s/s D; § 483.60(c) (2) (Tag F 429), s/s D.

10. Petitioner has not challenged the alleged violations of 42 C.F.R. § 483.10(d)(3) (Tag F164), (s/s) of D; § 483.20(k) (2) (Tag F280), s/s E; § 483.25(d)(1) (Tag F315), s/s D; § 483.35(e) (Tag F367), s/s D; § 483.60(c) (2) (Tag F 429), s/s D.

B. Conclusions of Law

1. Petitioner's request for hearing was untimely.

2. The impact of Hurricane Katrina upon Petitioner's counsel is not good cause for Petitioner not filing the request for hearing within the 60-day period allowed by the regulations or for extending the time in which Petitioner might file.

3. Participation in the state IDR process is not good cause for extending the period during which Petitioner might request a hearing.

4. Dismissal of Petitioner's request for hearing is appropriate pursuant to 42 C.F.R. § 498.70(c).

5. The alleged violations of 42 C.F.R. § 483.10(d)(3) (Tag F164), (s/s) of D; § 483.20(k) (2) (Tag F280), s/s E; § 483.25(d)(1) (Tag F315), s/s D; § 483.35(e) (Tag F367), s/s D; § 483.60(c) (2) (Tag F 429), s/s D, are unchallenged by Petitioner and pursuant to 42 C.F.R. § 498.20(b) those findings are final and binding upon Petitioner.

6. Petitioner has not disputed five deficiency citations at a scope and severity of D and E, and Petitioner has thus failed to dispute that it was not in substantial compliance as to each of the undisputed deficiencies.

7. Any one of the undisputed deficiencies provides a sufficient basis for CMS to terminate Petitioner's provider agreement and a sufficient basis for the imposition of a DPNA.

8. Petitioner has no right to review of either the scope and severity determination by CMS when the remedy is a DPNA or the choice of remedy. 42 C.F.R. §§ 488.408(g)(2), 498.3(b)(14) and (d)(10)(I).

9. Given the nature of the DPNA remedy (*see* 42 C.F.R. § 488.417), even if I ruled in Petitioner's favor on the two deficiencies challenged, such a ruling would have no impact upon the DPNA that is supported by one or more of the undisputed deficiencies.

10. Any ruling I might make in favor of Petitioner on the merits of its appeal would lead to no remedy, rendering this a moot case, and a party does not have a right to even an advisory opinion in a moot case and dismissal is appropriate pursuant to 42 C.F.R. § 498.70(b).

C. Issues

The issues raised by the CMS motion to dismiss are:

> Whether Petitioner's request for hearing should be dismissed because it is untimely; and/or,
>
> Whether Petitioner's request for hearing should be dismissed because it is moot.

D. Applicable Law

Petitioner is a long-term care facility participating in the federal Medicare program as a SNF and in the state Medicaid program as a NF. The statutory and regulatory requirements for participation by a long-term care facility are found at sections 1819 and 1919 of the Social Security Act (Act) and at 42 C.F.R. Part 483.

Pursuant to the Act, the Secretary has delegated to CMS and the states the authority to impose remedies against a long-term care facility that is not complying substantially with federal participation requirements. The purpose of imposing enforcement remedies is to ensure prompt compliance with program requirements. 42 C.F.R. § 488.402(a). Facilities that participate in Medicare may be surveyed on behalf of CMS by state survey agencies in order to determine whether the facilities are complying with federal participation requirements. 42 C.F.R. §§ 488.10- 488.28, 488.300-488.335. Pursuant to 42 C.F.R. Part 488, CMS may impose remedies, including a DPNA, against a long-term care facility when a state survey agency concludes that the facility is not complying substantially with federal participation requirements. 42 C.F.R. §§ 488.406; 488.408; 488.430. "*Substantial compliance* means a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." *Id*. (emphasis in original).

The Act and regulations make a hearing before an ALJ available to a long-term facility against whom CMS has determined to impose an enforcement remedy. Act, section 1128A(c)(2); 42 C.F.R. §§ 488.408(g); 498.3(b)(13). The hearing before an ALJ is a *de novo* proceeding. *Anesthesiologists Affiliated, et al*, DAB CR65 (1990*), aff'd*, 941 F2d. 678 (8th Cir. 1991). A facility has a right to appeal a "certification of noncompliance leading to an enforcement remedy." 42 C.F.R. § 488.408(g)(1); *see also* 42 C.F.R. §§ 488.330(e) and 498.3. However, the choice of remedies by CMS or the factors CMS considered when choosing remedies, are not subject to review. 42 C.F.R. § 488.408(g)(2). A facility may only challenge the scope and severity level of noncompliance found by CMS if a successful challenge would affect the amount of the CMP that could be collected by CMS or impact upon the facility's nurse aide training program. 42 C.F.R. §§ 498.3(b)(14) and (d)(10)(I). CMS's determination as to the level of noncompliance "must be upheld unless it is clearly erroneous." 42 C.F.R. § 498.60(c)(2). This includes CMS's finding of immediate jeopardy. *Woodstock Care Center*, DAB No. 1726, at 9, 38 (2000), *aff'd, Woodstock Care Center v. Thompson*, 363 F.3d 583 (6th Cir. 2003). The Departmental Appeals Board (the Board) has long held that the net effect of the regulations is that a provider has no right to challenge the scope and severity level assigned to a noncompliance finding, except in the situation where that finding was the basis for an immediate jeopardy determination. *See, e.g., Ridge Terrace*, DAB No. 1834 (2002); *Koester Pavilion*, DAB No. 1750 (2000).

When a penalty is proposed and appealed, CMS must make a *prima facie* case that the facility has failed to comply substantially with federal participation requirements. "*Prima facie*" means that the evidence is "(s)ufficient to establish a fact or raise a presumption unless disproved or rebutted." *Black's Law Dictionary* 1228 (8th ed. 2004). *See also, Hillman Rehabilitation Center*, DAB No. 1611, at 8 (1997), *aff'd, Hillman Rehabilitation Center v. U.S. Dept. of Health and Human Services*, No. 98-3789 (D.N.J. May 13, 1999). To prevail, a long-term care facility must overcome CMS's showing by a preponderance

of the evidence. *Batavia Nursing and Convalescent Center*, DAB No. 1904 (2004); *Batavia Nursing and Convalescent Inn*, DAB No. 1911 (2004); *Emerald Oaks*, DAB No. 1800 (2001); *Cross Creek Health Care Center*, DAB No. 1665 (1998); *Hillman Rehabilitation Center*, DAB No. 1611.

E. Analysis

The regulations are clear regarding the requirements for timely filing a request for hearing. Title 42 C.F.R. § 498.40(2) provides:

> The affected party or its legal representative or other authorized official 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 . . . .

The 60 days runs from the date of receipt by the affected party, which is presumed to be five days after the date of the notice unless it is shown that the notice was received earlier or later. 42 C.F.R. §§ 498.40(a)(2) and 498.22(b)(3). I have the discretion to extend the period for filing a request for hearing if the petitioner files a "written request for extension of time stating the reasons why the request was not filed timely," and I find good cause for the late filing is stated. 42 C.F.R. § 498.40(c). Although the legislative history for section 498.40 is not helpful to understanding application of these regulatory provisions in this case, [1] the requirement for timely filing a written request for hearing is commonly viewed as the means by which administrative finality can be achieved, *i.e.*, if there is no deadline for filing and an affected party may file at anytime, the record on an action may never be closed.

I am authorized to dismiss a request for hearing if it was not timely filed and I have not granted an extension of the period to file. 42 C.F.R. § 498.70(c).

Petitioner does not dispute that the June 9, 2005 notice from the state agency is the notice of initial determination required by 42 C.F.R. § 498.20(a). Petitioner does not indicate when the June 9, 2005 notice was received but asserts in its request for hearing at page 2 and also in the request for IDR dated June 30, 2005 (Exhibit C to the Request for Hearing), that the CMS 2567-L Statement of Deficiencies which was referenced in the June 9 notice as attached, was not received by Petitioner until June 20, 2005. Pursuant to 42 C.F.R. §§ 498.40(a)(2) and 498.22(b)(3), there is a rebuttable presumption that the June 9 notice was received within five days of the date of that notice. CMS has not disputed Petitioner's representation that the Statement of Deficiencies was not received

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[1] 52 Fed. Reg. 22446 (June 12, 1987).

until June 20, 2005, and for purposes of this decision I treat the five-day-presumption as rebutted and treat June 20, 2005 as the date of actual receipt of the notice of initial determination. Pursuant to 42 C.F.R. § 498.40, an affected party or its legal representative must file a request for hearing in writing within 60 days from receipt of the notice of initial determination. Actual receipt was June 20, 2005, and the 60-day period for requesting a hearing expired August 19, 2005. Petitioner's request for hearing dated October 25, 2005, is clearly late as recognized by Petitioner's request for an extension of time in which to file that request. The issue is whether there is good cause to grant Petitioner the requested extension of time in which to file a request for hearing. Petitioner advances two arguments for granting an extension:(1) Hurricane Katrina; and (2) Petitioner could not decide whether or not an appeal would be necessary until it received the results of IDR on August 18, 2005. Petitioner's Memorandum in Opposition to Respondent's Motion to Deny Extension Request and Motion to Dismiss (Petitioner's Memo.) at 2-3. Neither argument is meritorious.

According to counsel for Petitioner, she was required to evacuate New Orleans on August 26, 2005, i.e., eight days after receiving the results of IDR on August 18, 2005, and did not have access to her office until October 2005. Petitioner's Memo. at 3. Of course, counsel's evacuation did not occur until seven days after the 60-day period for requesting a hearing had already expired. Thus, I cannot find that the impact of Hurricane Katrina was cause for Petitioner not filing the request for hearing within the 60-day period for requesting a hearing.

Petitioner's real excuse for not timely filing the request for hearing is that Petitioner was waiting for the IDR results. The gist of Petitioner's argument is that it was awaiting the IDR results so Petitioner could decide whether or not an appeal was necessary. The IDR results were received on August 18, 2005 and counsel had to evacuate New Orleans eight days later before she could post mark the request for hearing. Petitioner asserts that the delay associated with receiving the IDR results constitutes good cause for granting the requested extension. [2] This argument has no merit.

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[2] There is no evidence that there was any modification to the enforcement remedy, the DPNA, due to the IDR results. There is no evidence of a notice of reopened and revised determination by the state agency or CMS. Petitioner does not argue that there was a new 60-day period for requesting a hearing triggered by the notice of IDR results, and any such argument would be without merit absent some evidence of a reopened and revised determination. *See Concourse Nursing Home,* DAB No. 1856 (2002).

Participation in state IDR has been repeatedly held by the Board and ALJs, not to be good cause for granting an extension of time for filing a request for hearing. The IDR process established by 42 C.F.R. § 488.331 does not toll the federal appeal process because it is a separate procedure in addition to the appeal rights provided to facilities under federal regulations. The purpose of the IDR process is to give the affected provider an opportunity to resolve the matter quickly without the need for litigation. 59 Fed. Reg. 56147 (Nov. 10, 1994). But IDR does not substitute for the hearing process or constitute good cause for delay of the hearing process. *See Prospect Heights Care Center*, DAB CR802 (2001). Furthermore, as the Board noted in the *Cary* decision, "(i)f approaching the deadline for termination to go into effect and/or choosing to participate in an IDR process were sufficient to excuse the failure to file a timely request for a federal hearing, the time frame for such appeals would become almost meaningless. *Cary Health and Rehabilitation Center,* DAB No. 1771 (2001); *see also, Hillcrest Healthcare, L.L.C.,* DAB No. 1879 (2003); *Concourse Nursing Home,* DAB No. 1856 (2002); *Nursing Inn of Menlo Park,* DAB No. 1812 (2002) (IDR is not cause to extend period for filing an appeal).

I conclude that Petitioner has not established good cause for an extension of the time in which to file its request for hearing and dismissal is appropriate pursuant to 42 C.F.R. § 498.70(c).

The CMS argument that Petitioner's request for hearing presents a moot case also merits discussion. The surveyors cited Petitioner with violations of 42 C.F.R. § 483.10(d)(3) (Tag F164)[3] at a scope and severity level (s/s) of D; § 483.20(b) (Tag F272), s/s D; §

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[3] This is a "Tag" designation that refers to the part of the State Operations Manual (SOM), Appendix P, "Survey Protocol for Long Term Care Facilities," "Guidance to Surveyors" that pertains to the specific regulatory provision allegedly violated. The cited deficiencies are set forth in a Statement of Deficiency, Form 2567L (SOD) prepared by the state surveyors. Each deficiency includes a scope and severity level (SS) level such as "SS=J." *See, e.g.,* CMS Ex. 4, at 1 (left column). Scope and severity levels are used by CMS and a state agency when selecting remedies. The scope and severity level is designated by an alpha character, A through L, selected by CMS or the state agency from the scope and severity matrix published in the SOM at section 7400E. A scope and severity level of A, B, or C indicates a deficiency that presents no actual harm but has the potential for minimal harm. Facilities with deficiencies of a level no greater than C remain in substantial compliance. 42 C.F.R. § 488.301. A scope and severity level of D, E, or F indicates a deficiency that presents no actual harm but has the potential for more than minimal harm that does not amount to immediate jeopardy. A scope and severity

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483.20(k) (Tag F279), s/s D; § 483.20(k)(2) (Tag F280), s/s E; § 483.25(d)(1) (Tag F315), s/s D; § 483.25(h)(2) (Tag F324), s/s G; § 483.35(e) (Tag F367), s/s D; § 483.60(c) (2) (Tag F 429), s/s D. Appendix A to the Request for Hearing. Petitioner requested IDR as to Tags F272, F279, F280, F315, F324, F367 and a state deficiency (not cited as a violation of a federal provision). Appendix C to the Request for Hearing. The IDR resulted in deletion of Tag F279 and the state deficiency but affirmation of Tags F272, F280, F315, F324, and F367. Appendix A to the Request for Hearing. In its October 25, 2005 request for hearing, Petitioner only challenges Tags F272 and F324. Thus, the alleged violations of 42 C.F.R. § 483.10(d)(3) (Tag F164), (s/s) of D; § 483.20(k)(2) (Tag F280), s/s E; § 483.25(d)(1) (Tag F315), s/s D; § 483.35(e) (Tag F367), s/s D; § 483.60(c) (2) (Tag F 429), s/s D, are unchallenged by Petitioner and pursuant to 42 C.F.R. § 498.20(b) are final and binding upon Petitioner. The gist of the CMS argument is that the unchallenged deficiencies are a sufficient and proper basis for the imposition of a DPNA enforcement remedy; that therefore there is nothing for me to review; and that there is no remedy I can fashion for Petitioner, thus rendering this a moot case. I agree with CMS.

CMS may conclude that a long-term care facility is not in substantial compliance and terminate the provider's participation agreement based upon a deficiency at a scope and severity level of D or higher, *i.e.,* a deficiency that presents the potential for more than minimal harm. 42 C.F.R. § 488.456(b). In addition to, or in lieu of termination, CMS may, upon finding a facility is not in substantial compliance, also impose one or more of the other remedies specified in 42 C.F.R. § 488.406, including a DPNA. In this case, Petitioner has not disputed five deficiency citations at a scope and severity of D and E. Thus, Petitioner has failed to dispute that it was not in substantial compliance as to each of the undisputed deficiencies. Any one of the undisputed deficiencies provides a sufficient basis for CMS to terminate Petitioner's provider agreement and a sufficient basis for the imposition of a DPNA. Petitioner cannot obtain review of either the scope and severity determination by CMS when the remedy is a DPNA or the choice of remedy. 42 C.F.R. §§ 488.408(g)(2), 498.3(b)(14) and (d)(10)(I). Furthermore, given the nature of the DPNA remedy (*see* 42 C.F.R. § 488.417), even if I ruled in Petitioner's

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level of G, H, or I indicates a deficiency that involves actual harm that does not amount to immediate jeopardy. Scope and severity levels J, K, and L are deficiencies that constitute immediate jeopardy to resident health or safety. Letters A, D, G, and J indicate an isolated occurrence, letters B, E, H, and K indicate a pattern of occurrences, and letters C, F, I, and L indicate widespread occurrences. The matrix, which is based on 42 C.F.R. § 488.408, specifies which remedies are required and optional at each level based upon the frequency of the deficiency. *See* SOM, section 7400E.

favor on the two deficiencies challenged, such a ruling would have no impact upon the DPNA that is supported by one or more of the undisputed deficiencies. The net effect is that any ruling I might make in favor of Petitioner on the merits of its appeal would lead to no remedy, rendering this a moot case. A party does not have a right to even an advisory opinion in a moot case and dismissal is appropriate pursuant to 42 C.F.R. § 498.70(b).

III. Conclusion

For the foregoing reasons, Petitioner's request for hearing is dismissed.

/s/
KEITH W. SICKENDICK
Administrative Law Judge