Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gladeview Health Care Center
(CCN: 07-5313),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-11-69

Decision No. CR2378

Date: May 26, 2011

DECISION

Petitioner, Gladeview Health Care Center (Petitioner or facility), is a long-term care facility, located in Old Saybrook, Connecticut, that participates in the Medicare program. Based on a survey completed July 1, 2010, the Centers for Medicare and Medicaid Services (CMS) determined that the facility was not in substantial compliance with Medicare program requirements. Petitioner concedes that it was not in substantial compliance but challenges CMS's scope and severity finding. CMS moves to dismiss Petitioner's hearing request under 42 C.F.R. § 498.70(c), because it was not filed timely. In the alternative, CMS argues that Petitioner's hearing request must be dismissed under section 498.70(b), because Petitioner does not have the right to a hearing on the only issue it has raised.[1]

I dismiss as untimely Petitioner's hearing request. In the alternative, Petitioner's hearing request must be dismissed because the sole issue it raises is not reviewable in this forum.

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[1] Each of the parties has filed a written argument (CMS Br.; P. Br.). CMS has submitted nine exhibits (CMS Exs. 1-9). Petitioner has submitted nine exhibits (P. Exs. 1-9).

Discussion

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

Section 1866(h) of the Social Security Act (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 of Health and Human Services must provide 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. Act § 205(b) (emphasis added). The 60-day time limit is thus a statutory requirement. *See Cary Health and Rehab. Ctr.*, DAB No. 1771 at 8-9 (2001).

Similarly, the regulations mandate that the affected party "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)(2). On motion of a party, or on his/her own motion, the Administrative Law Judge (ALJ) may dismiss a hearing request that was not timely filed if the time for filing was not extended. 42 C.F.R. § 498.70(c). Receipt of the notice 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." 42 C.F.R. §§ 498.40(a)(2), 498.22(b)(3).

The parties agree that Petitioner's hearing request was not timely filed.

CMS sent Petitioner a notice letter dated August 11, 2010. The letter advised Petitioner that, based on the July 1, 2010 survey, the facility was not in substantial compliance with Medicare requirements and that CMS was imposing a $4,000 per instance civil money penalty (CMP). CMS Ex. 2. The notice further advised Petitioner that, if it disagreed with CMS's determination, it could request a hearing before an ALJ. The letter specified that the "written request for hearing must be filed no later than 60 days from the date of your receipt of this letter." CMS Ex. 2, at 3. The letter also pointed out the procedural rules governing the hearing process (42 C.F.R. § 498.40 *et. seq.*) and provided the address for the Civil Remedies Division of the Departmental Appeals Board. CMS Ex. 2, at 3.

The language in CMS's notice letter is unambiguous: Petitioner's appeal had to be filed within 60 days of receipt. Assuming five days for delivery, Petitioner received it on

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

Augusts 16, so Petitioner's hearing request was due no later than October 15, 2010. Petitioner filed its hearing request by letter dated October 27, 2010, which was untimely, and, absent a showing of good cause for my granting an extension of time in which to file, should be dismissed pursuant to 42 C.F.R. § 498.70(c).

Petitioner justifies its failure to appeal timely by pointing out that it "filed a timely Informal Dispute (IDR) with the State of Connecticut to challenge the findings of the Survey and the appropriateness of the two (2) deficiencies being challenged now at the level of an [ALJ] hearing." P. Br. at 2. Petitioner claims that the State of Connecticut made it "impossible" for the facility to request a hearing timely. Petitioner filed its IDR request on August 11. Despite Petitioner's repeated efforts to hasten the process, the state did not decide the matter until October 18, 2010. The responsible state employee, Barbara Yard, notified Petitioner's representative of the result at that time, but he was then out of the state. Within two days of his return, he filed Petitioner's hearing request.

Petitioner also claims that, in their October 18 conversation, Barbara Yard told him that late filing "should not be an issue since it was not the facility's fault that the IDR process had taken longer than expected." P. Br. at 9.

It is long-settled that waiting for the results of IDR does not constitute good cause for untimely filing. The Departmental Appeals Board has repeatedly pointed out that the state IDR process is separate from and in addition to the appeal rights provided facilities under federal regulations. A facility cannot reasonably conclude that participation in IDR somehow tolls the federal appeals process. *Quality Total Care, L.L.C., d/b/a The Crossings*, DAB No. 2242 at 10 (2009)) (*citing Concourse Nursing Home*, DAB No. 1856 (2002)); *Hillcrest Healthcare, LLC.*, DAB No. 1879 (2003) (finding under any reasonable definition of "good cause," a facility's election to resolve its dispute by other means does not excuse its failure to file a timely hearing request).

Nor am I persuaded that Petitioner reasonably relied on any representations from a state employee. According to Petitioner, when he raised the issue with Barbara Yard, she suggested that filing delays should not be a problem. P. Br. at 8, 9. As the Supreme Court noted in *Heckler v. Cmty. Health Servs. of Crawford County*, 467 U.S. 51, 64 (1984), by consulting CMS's agent (in that case, the fiscal intermediary), a Medicare provider showed that, it "indisputably knew" that its eligibility for certain funds was a "doubtful question." The provider's subsequent reliance on the intermediary's erroneous advice was unreasonable. As a recipient of public finds, the provider should have known that the intermediary neither made policy nor resolved the types of questions the provider posed. Only the Secretary had that authority, as the relevant statute, regulations and policy manual made "perfectly clear." *Crawford County*, 467 U.S. at 64-65. Yet, the provider made no attempt to resolve its questions with the Secretary; it "was satisfied with the policy judgment of a mere conduit." *Crawford County*, 467 U.S. at 65; *accord Regency on the Lake*, DAB No. 2205 at 5 (2008) (finding a provider's reliance on

statements of state employees "particularly unreasonable" because it should have known that neither a state agency nor its employees are empowered to find a facility eligible to participate in the Medicare program; only the Secretary has the final authority to make that determination).

That Petitioner here purportedly relied on oral advice weakens its position even more. The *Crawford County* court also pointed out that such reliance is inherently unreasonable, not only because of the possibility of fraud, but also because written records are necessary to ensure that governmental agents stay within the lawful scope of their authority and that those who seek public funds "act with scrupulous exactitude." *Crawford County*, 467 U.S. at 65.

Unlike the provider's underlying question in *Crawford County* (which was unresolved), the statute and regulations here unambiguously require that a provider file its hearing request within 60 days of receiving CMS's notice. CMS's August 11 notice letter told Petitioner about the filing deadline. Without good cause, Petitioner failed to meet the deadline, so its hearing request must be dismissed under 42 C.F.R. § 498.70(c).

2. CMS's scope and severity finding is not reviewable in this forum

Even if Petitioner's hearing request had been filed timely, I would nevertheless dismiss pursuant to 42 C.F.R. § 498.70(b), because Petitioner has no right to a hearing on the issue it raises.

Petitioner admits that its staff made a significant medication error that "had the potential to cause harm to the resident," and was thus not in substantial compliance with program requirements. P. Br. at 6. Petitioner challenges CMS's determination as to the scope and severity of two cited deficiencies. CMS determined that the facility was not in substantial compliance with 42 C.F.R. § 483.20(k)(3)(i) (professional standards of quality) and § 483.25 (quality of care), at a G level of scope and severity (isolated instance of noncompliance that causes actual harm).

An ALJ may review CMS's scope and severity findings only if a successful challenge would affect the range of the CMP or if CMS has made a finding of substandard quality of care that results in the loss of approval of a facility's nurse aide training program. 42 C.F.R. § 498.3(b)(14); 42 C.F.R. § 498.3(d)(10); *Cedar Lake Nursing Home*, DAB 2344 at 9 (2010); *Evergreen Commons*, DAB No. 2175 (2008); *Aase Haugen Homes*, DAB No. 2013 (2006). Here, the penalty imposed is a per instance CMP, for which the regulations provide only one range ($1,000 to $10,000), so the level of noncompliance

does not affect the range of the CMP. 42 C.F.R. § 488.438(a)(2).[3] The parties also agree that the scope and severity finding does not affect approval of the facility's nurse aide training program. CMS Br. at 5; *see* P. Br. at 7. Petitioner is therefore not entitled to review.

I recognize that the scope and severity findings may result in collateral consequences unfavorable to the facility, but these considerations do not override the regulations by which I am bound.

Conclusion

For the reasons discussed above, I dismiss Petitioner's hearing request pursuant to 42 C.F.R. § 498.70(c), because it was not timely filed, and no good cause justifies extending the time for filing. In the alternative, Petitioner's hearing request must be dismissed pursuant to 42 C.F.R. § 498.70(b), because Petitioner has no right to a hearing on the sole issue it raises.

/s/
Carolyn Cozad Hughes
Administrative Law Judge

[3] Moreover, the deficiencies are cited at a G level of scope and severity rather than at the immediate jeopardy level, which means that a per-day penalty would have been in the lower range (42 C.F.R. § 488.438(a)(ii)), and a successful challenge to scope and severity would again not have changed the range of the CMP.