

**Department of Health and Human Services**  
**DEPARTMENTAL APPEALS BOARD**  
**Appellate Division**

St. George Health Care Center  
Docket No. A-15-40  
Decision No. 2645  
June 30, 2015

**FINAL DECISION ON REVIEW OF  
ADMINISTRATIVE LAW JUDGE ORDER**

St. George Health Care Center (St. George), a skilled nursing facility (SNF), appeals an “Acknowledgement and Order of Dismissal” of an Administrative Law Judge (ALJ), which dismissed St. George’s request for hearing (RFH) on a July 31, 2014 determination of the Centers for Medicare & Medicaid Services (CMS) as untimely and not supported by good cause for late filing. *St. George Health Care Center*, ALJ Ruling No. 2015-04 (November 21, 2014) (ALJ Order). St. George requests review of the ALJ Order by the Board. The Board sustains the ALJ Order.

**Background**<sup>1</sup>

Long-term care facilities, including SNFs, must be in substantial compliance with Medicare participation requirements. State survey agencies, under agreement with the Secretary of Health and Human Services, perform onsite surveys to verify compliance with the requirements and report deficiency findings. CMS may impose remedies on noncompliant facilities. *See* Social Security Act (Act) §§ 1819(g)(1)(A), 1864(a)<sup>2</sup>; 42 C.F.R. Part 483, subpart B and Part 488, subparts A, E, F. Facilities may challenge appealable “initial determinations” of CMS resulting from surveys, which include noncompliance findings leading to the imposition of enforcement actions, by requesting an ALJ hearing within 60 days of receipt of notice of that initial determination. 42 C.F.R. §§ 488.408(g)(1), 498.3(b)(13), 498.40(a)(2). The ALJ may extend the time for filing a hearing request “[f]or good cause shown” and may dismiss an untimely hearing request where the time for filing was not extended. 42 C.F.R. § 498.40(c).

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<sup>1</sup> The factual information in this section, unless otherwise indicated, is drawn from the ALJ Order and the record and is presented to provide a context for the discussion of the issues raised on appeal.

<sup>2</sup> The current version of the Social Security Act can be found at [http://www.socialsecurity.gov/OP\\_Home/ssact/ssact-toc.htm](http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.htm). Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table.

By determination dated July 31, 2014, CMS notified St. George that it was found not in substantial compliance with various participation requirements based on the results of a state survey, performed on July 18, 2014, which found deficiencies at the St. George facility, including some that posed immediate jeopardy to residents' health and safety. July 31, 2014 determination at 1-3. St. George was informed of its right to appeal the determination within 60 days from the date of receipt of the determination. *Id.* at 5. By another determination dated August 21, 2014, CMS notified St. George that August 7, 2014 revisit survey findings resulted in the removal of one deficiency finding found on July 18, 2014, but that additional remedies were being imposed because St. George remained out of substantial compliance with various requirements. August 21, 2014 determination at 1-2. The determination notified St. George of its right to appeal the August 21, 2014 determination within 60 days of receipt of the determination. *Id.* at 3.

On October 20, 2014, St. George filed an appeal, specifying that it was appealing the August 21, 2014 determination and requesting an "extension of time to file a request for hearing for the penalties identified in the July 31, 2014 letter." ALJ Order at 2, citing RFH at 1. The ALJ treated the appeal as two requests for hearing, one for the July 31, 2014 determination (docket number C-15-407) and one for the August 21, 2014 determination (docket number C-15-408). *Id.* at 2.<sup>3</sup>

St. George admitted, and the ALJ found, that the appeal of the July 31, 2014 determination was filed late. *Id.* at 2, 3. The ALJ considered St. George's explanation of why its appeal was late as an attempt to establish good cause for late filing. The ALJ stated, "[St. George] states that it 'overlooked' the filing deadline. It was busy trying to implement corrective actions. [St. George] states that the penalties are a severe hardship and that if it does not need to pay the civil money penalties imposed it can continue to make permanent changes. It also implies that it might be able to prevail if allowed to continue to appeal because an Independent Informal Dispute Resolution made recommendations that were favorable to [St. George]." *Id.* at 4, citing RFH at 1-2. The ALJ concluded that there was no good cause for extending the filing deadline for the July 31, 2014 determination. As the ALJ noted, the July 31, 2014 determination "clearly stated that [St. George] had 60 days from receipt of the determination to request a hearing" and provided the "specific address where [St. George] was to mail its RFH." *Id.* The ALJ stated that, even though the "determination explicitly advised [St. George] of its right to request a hearing[,]" St. George "does not explain why it disregarded this clear notice of its further appeal rights other than it 'overlooked' the filing deadline. [St.

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<sup>3</sup> CMS's July 31, 2014 and August 21, 2014 determinations were submitted as attachments to the request for hearing for the case docketed under docket number C-15-407, but were not marked with exhibit and exhibit page numbers. The determinations themselves are not paginated.

George’s] explanation does not provide a legal excuse for failing to file a hearing request timely and thus does not meet any reasonable definition of good cause.” *Id.* at 4-5. The ALJ dismissed the request for hearing on the July 31, 2014 determination. *Id.* at 5.<sup>4</sup>

### **Standard of Review**

The standard of review for disputed issues of law is whether the ALJ decision is erroneous. The standard of review for disputed issues of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. *See Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider’s Participation in the Medicare and Medicaid Programs (Guidelines)*, available at <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).

### **Analysis**

The regulation governing the content of a request for review by the Board requires an appellant to “specify the issues, the findings of fact or conclusions of law with which the party disagrees, and the basis for contending that the findings and conclusions are incorrect.” 42 C.F.R. § 498.82(b); *see also Guidelines* (section headed “Starting the Review Process,” ¶ (d)). The request for review filed by St. George does not contain any of this content but, instead, refers to two enclosed affidavits “in support of our request for appellate review . . . .” Accordingly, the request for review on its face does not comply with the regulation and provides no basis for review. The referenced affidavits (from individuals whose initials are J.H. and C.G.) also do not contain the required content. Instead, each affiant refers to CMS’s July 31, 2014 and August 21, 2014 determination notices and states, “Upon my review of the Second Notice, I understood that the Second Notice modified the First Notice such that an appeal of the First Notice was required to be filed on or before October 20, 2014 rather than September 29, 2014.” By referring to the affidavits as “support” for “our request for appellate review . . . [,]” St. George appears

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<sup>4</sup> As the ALJ stated, the regulations in 42 C.F.R. Part 498 do not define what constitutes “good cause” to extend the filing deadline for a hearing request (section 498.40(c)). ALJ Order at 3. The Board “has never attempted to provide an authoritative or complete definition of the term ‘good cause’ in section 498.40(c).” *Brookside Rehab. & Care Ctr.*, DAB No. 2094, at 7 n.7 (2007). We have, however, stated that we “need not decide the precise scope of ‘good cause’” where a facility “failed to establish ‘good cause’ for extending the filing deadline, under any reasonable definition of that term.” *See Rutland Nursing Home*, DAB No. 2582, at 5 (2014).

to be attempting to argue here that the affiants' averred understanding that CMS's second determination notice changed the deadline for appealing from CMS's first determination notice constitutes good cause for the late filing. However, St. George did not make this good cause argument before the ALJ and, accordingly, cannot make it here as a basis for Board review. See *Guidelines* (section headed "Completion of the Review Process," ¶ (a), stating, in relevant part, "The Board will not consider issues not raised in the request for review, nor issues which could have been presented to the ALJ but were not."); *Estes Nursing Facility Civic Ctr.*, DAB No. 2000, at 8 (2005).

The "good cause" argument St. George attempts to make here is not only an argument not raised before the ALJ but, we conclude, is wholly inconsistent with the "good cause" argument it did make before the ALJ. Before the ALJ, St. George admitted, and the ALJ found, that St. George had not appealed the July 31, 2014 determination within the 60-day period provided by the regulations. St. George expressly stated in its request for hearing that it was appealing CMS's August 21, 2014 determination and also stated that it was "requesting an extension of time to file a request for a hearing for the penalties identified in the July 31, 2014 letter . . . ." St. George further stated, "We deeply regret missing this vital submission date" and explained that it had "overlooked the time-frames given the number of letters and communications that were occurring at the time" in connection with actions "to assure the safety of residents and implement swift and effective corrective action." RFH at 1-2. Thus, St. George's current position, i.e., that St. George did not construe the July 31, 2014 determination to be an appealable determination distinct and separate from the August 21, 2014 determination, appears on its face to be entirely inconsistent with its statements in the ALJ proceeding, and St. George does not even attempt to offer any basis for us to conclude otherwise.

The ALJ found that St. George's explanation that it had "overlooked" the filing deadline because it had been occupied with implementing corrective actions was not a satisfactory explanation of good cause. ALJ Order at 4-5. As the ALJ noted, the July 31, 2014 determination clearly notified St. George of its right to appeal that determination within 60 days from the receipt of the determination, but St. George failed to address why it disregarded that notice. *Id.* St. George's explanation, the ALJ determined, "does not meet any reasonable definition of good cause." *Id.*, citing *Kids Med (Delta Medical Branch)*, DAB No. 2471 (2012). In its request for review, St. George does not even articulate that it disagrees with the ALJ's analysis much less allege that the ALJ abused his discretion in concluding St. George had not shown "good cause" for the late filing. Accordingly, there is no issue for the Board to review and no basis for disturbing the ALJ Decision. St. George's attempt to obtain Board review based on a new and inconsistent argument must fail.

Moreover, the affidavits raising the new issue are not properly before the Board, and we would not admit them. The Board does not admit new evidence in the absence of a showing of good cause for not producing it earlier. *Ocean Springs Nursing Ctr.*, DAB No. 2212, at 4 (2008). St. George knew, or should have known, that the Board would hold it to a showing of good cause for offering new evidence because the Board's *Guidelines* (section headed "Development of the Record on Appeal," ¶ (g)), a copy of which was sent to St. George as an enclosure with the November 21, 2014 letter transmitting the ALJ Order, gave notice of this requirement. Also, St. George had legal notice of this requirement at 42 C.F.R. § 498.86(a). Yet, St. George did not attempt to articulate why it could not have offered the affidavits before the ALJ. In addition, when considering whether to admit new evidence, the Board must determine whether it is relevant and material to an issue before it. *See* 42 C.F.R. § 498.86(a). The affidavits are not relevant and material to our determination on the propriety of the dismissal since, as discussed above, they address an issue that was not raised before the ALJ and, therefore, is not properly before us. In any case, the August 21, 2014 determination undercuts St. George's position, stated in the affidavits, that it believed that determination modified the July 31, 2014 determination because the August 21, 2014 determination clearly stated that the appeal rights set out therein related only to the findings made during the August 7, 2014 revisit survey.

### **Conclusion**

Based on the foregoing reasons, the Board sustains the ALJ Order.

\_\_\_\_\_/s/  
Sheila Ann Hegy

\_\_\_\_\_/s/  
Constance B. Tobias

\_\_\_\_\_/s/  
Susan A. Yim  
Presiding Board Member