Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	Date: July 17, 2007
Nightengale of Oak Park, Inc., (CCN: 14-7641),	)	
	)	Docket No. C-07-259
Petitioner,	)	Decision No. CR1622
	)	
-v.-	)	
	)	
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

The request for hearing of Petitioner, Nightengale of Oak Park, Inc., dated May 25, 2006, is dismissed pursuant to 42 C.F.R. § 498.70(c). The request for hearing was not timely filed and Petitioner has not shown good cause for an extension of time within which to file its request for hearing.

I. Background

Petitioner, located in Oak Park, Illinois, was certified by the Centers for Medicare & Medicaid Services (CMS) to participate in the Medicare program as a home health agency. Effective March 24, 2006, CMS terminated Petitioner's participation in the program based upon surveys by the Illinois Department of Public Health (the state agency) completed on September 15, 2005, December 14, 2005, and February 15, 2006,[1] which found that Petitioner was not in compliance with program participation requirements. Joint Stipulation of Fact, dated April 25, 2007 (Jt. Stip.).

[1] The survey completed on September 15, 2005, was a compliance survey. The surveys completed on December 14, 2005 and February 15, 2006, were revisit surveys.

CMS notified Petitioner by letter, dated January 11, 2006, that Petitioner's participation in Medicare would be terminated, effective March 14, 2006, based upon the findings of the September and December surveys. The state agency conducted a revisit survey that was completed on February 15, 2006, which found that Petitioner continued to be out of compliance with a participation requirement. CMS notified Petitioner by letter, dated March 3, 2006, that Petitioner continued not to be in compliance with program requirements as of the February 2006 survey and that its participation would be terminated, but that termination would be effective March 24, 2006 rather than March 14, 2006. CMS notified Petitioner by letter dated March 17, 2006, that its plan of correction was not acceptable and that its participation would be terminated effective March 24, 2006. CMS notified Petitioner by letter dated March 28, 2006, that its participation in Medicare was terminated effective March 24, 2006. Jt. Stip.

Petitioner sent a letter, dated January 8, 2007, to the CMS office in Chicago inquiring as to the status of its appeal of Petitioner's termination. Petitioner enclosed, *inter. alia*, a document purporting to be a facsimile transmission record dated May 26, 2006. Petitioner also enclosed a letter dated May 25, 2006, addressed to CMS in Chicago, appealing the "March 28, 2006 decision . . . terminating" Petitioner's participation in Medicare and requesting a hearing before an administrative law judge (ALJ). By memorandum dated February 6, 2007, CMS forwarded Petitioner's documents requesting a hearing to the Departmental Appeals Board, where it was received on February 15, 2007. On February 16, 2007, the case was docketed, assigned to me for hearing and decision, and a Notice of Case Assignment and Prehearing Development Order (Prehearing Order) was issued at my direction.

On March 6, 2007, CMS filed a motion to dismiss Petitioner's request for hearing on grounds it was not timely filed, with a supporting memorandum (CMS Brief) and exhibits (CMS Exs.) 1-7. CMS also moved to stay further proceedings pending a ruling on its motion to dismiss. I granted the motion to stay by an order dated May 9, 2007. On May 18, 2007, Petitioner filed its response to the CMS motion to dismiss (P. Brief). On May 25, 2007, CMS filed a motion for leave to reply to Petitioner's response with its proposed reply (CMS Reply). The CMS motion for leave to file a reply is granted and the reply accepted and considered.

II. Discussion

A. Findings of Fact

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

1. CMS notified Petitioner by letter dated January 11, 2006, that Petitioner's participation in Medicare would be terminated effective March 14, 2006, based upon Petitioner's failure to comply with conditions of participation.

2. CMS notified Petitioner by letter, dated March 3, 2006, that Petitioner continued to not be in compliance with program requirements as of a February 2006 revisit survey and that its participation would be terminated, but that termination would be effective March 24, 2006 rather than March 14, 2006.

3. CMS notified Petitioner by letter, dated March 17, 2006, that its plan of correction was not acceptable and that its participation would be terminated effective March 24, 2006.

4. CMS notified Petitioner by letter, dated March 28, 2006, that its participation in Medicare was terminated effective March 24, 2006.

5. Petitioner requested a hearing by letter dated May 25, 2006.[2]

B. Conclusions of Law

1. Petitioner's request for hearing was untimely because it was filed more than 60 days after the January 11, 2006 notice of initial determination.

2. Reconsideration pursuant to 42 C.F.R. § 498.22 was not available to Petitioner.

3. CMS letters dated March 3, 2006, March 17, 2006, and March 28, 2006, do not show that CMS reopened or revised its January 11, 2006 initial determination to terminate Petitioner's participation in Medicare.

4. Petitioner has not shown good cause for extending the period for filing an appeal in this case.

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

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[2] CMS denies that it ever received a request for hearing from Petitioner in 2006. CMS Brief at 4-5; CMS Exs. 6, 7. Because I conclude that a request for hearing dated May 25, 2006, is untimely and appropriate for dismissal, I need not resolve the issue raised by CMS.

C. Issue

The issue raised by the CMS motion to dismiss is:

> Whether Petitioner's request for hearing should be dismissed because it is untimely.

D. Legal Background

Pursuant to section 1861(m) of the Social Security Act (the Act), Medicare covers "home health services" provided by a "home health agency" (HHA) as defined in section 1861(o). The Secretary of Health and Human Services (the Secretary) has promulgated regulations at 42 C.F.R. Part 484, which govern the participation of HHAs in the Medicare program. The provisions in 42 C.F.R. §§ 484.10-484.55 set forth the requirements for Medicare participation of HHAs and establish conditions of participation for these entities. The regulations prescribe the conditions of participation which include specific standards of participation.

CMS, on behalf of the Secretary, is required to determine whether a Medicare provider of services, including an HHA, is complying substantially with the Medicare participation requirements established by the Act and regulations. Act, section 1866(b)(2). In order to remain certified as a Medicare provider, an HHA must remain in substantial compliance with all conditions of participation. 42 C.F.R. §§ 489.53(a)(1) and (3). The process and criteria for determining whether a provider is complying substantially with Medicare participation requirements are established by regulations at 42 C.F.R. Part 488. CMS has entered into agreements with state survey agencies to conduct periodic surveys of providers, including HHAs, in order to ascertain whether the providers are complying with Medicare participation requirements. Act, section 1864(a); 42 C.F.R. §§ 488.10, 488.11, and 488.20. State survey agencies conduct surveys of HHAs and make recommendations to CMS as to whether such facilities meet federal participation requirements for the Medicare program. Act § 1864(a); 42 C.F.R. §§ 488.10, 488.11, and 488.20. CMS considers survey results from the state survey agencies as the basis for its determination regarding the initial or continued participation of an HHA in the Medicare program. 42 C.F.R. §§ 488.11 and 488.12.

In determining whether a provider complies with a particular condition of participation, the state survey agency evaluates the manner and degree of the provider's satisfaction of the various standards within each condition. 42 C.F.R. § 488.26(b). The state survey agency documents its findings on HCFA Form 2567, Statement of Deficiency, which the

provider receives after the survey is completed. 42 C.F.R. § 488.12. The state survey agency also makes a recommendation to CMS as to whether there is a basis for termination. CMS may accept or reject the recommendation after reviewing the survey findings.

CMS may terminate participation in Medicare when it determines, either on its own initiative or based on a state survey agency report, that a provider is not complying with one or more Medicare conditions of participation. Act, section 1866(b)(2)(A); 42 C.F.R. §§ 488.20, 488.24, 488.26, and 489.53(a)(1) and (3). Failure to comply with a condition of participation occurs where deficiencies, either individually or in combination, are "of such character as to substantially limit the provider's . . . capacity to furnish adequate care or which adversely affect the health and safety of patients . . . ." 42 C.F.R. § 488.24(b).

A provider whose participation in Medicare is terminated may request a hearing by an ALJ in accordance with 42 C.F.R. Part 498. 42 C.F.R. § 489.53(d).

E. Analysis

The regulations are clear regarding the requirements for timely filing a request for hearing. 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 run 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,[3] 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.

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[3] 52 Fed. Reg. 22,446 (June 12, 1987).

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 it received the January 11, 2006 CMS notice that its participation in Medicare would be terminated effective March 14, 2006. Petitioner also does not dispute that the January 11, 2006 CMS notice was a notice of initial determination that satisfied the requirements of 42 C.F.R. § 498.20(a). Neither Petitioner nor CMS has presented evidence to show that Petitioner received the January 11, 2006 notice more than or less than five days after January 11, 2006 and the presumption of delivery on the fifth day is unrebutted. Accordingly, I conclude that on January 16, 2006, Petitioner received the January 11, 2006 CMS notice of an initial determination that Petitioner's participation would be terminated effective March 14, 2006. Pursuant to 42 C.F.R. § 498.40, an affected party or its legal representative must file a request for hearing, in writing, and within 60 days from receipt of the notice of initial determination. Petitioner received the January 11, 2006 notice on January 16, 2006 and the 60-day period for requesting a hearing expired on March 17, 2006. Petitioner's request for hearing dated May 25, 2006 is clearly late. Petitioner does not request an extension or urge that there is good cause to extend the time for filing a request for hearing. Therefore, I have no basis on which to extend the period for filing to include May 25, 2006.

Rather than requesting an extension of the time in which to file, Petitioner argues that the CMS letter dated March 28, 2006, by which CMS notified Petitioner that its participation in Medicare was terminated effective March 24, 2006, amounted to a reconsideration decision or a revised determination and that the 60-day clock to file an appeal ran from Petitioner's receipt of that letter. Petitioner argues that it submitted a plan of correction which amounted to a request for reconsideration. According to Petitioner's theory, the March 3, 2006 CMS notice (CMS Ex. 2) shows that CMS received Petitioner's plan of correction, conducted a revisit survey, then reconsidered its initial determination and decided to continue with the termination but extended the termination date from March 14 to March 24, 2006. Petitioner argues that it submitted another plan of correction which was a request for reconsideration of the March 3, 2006 reconsidered determination and that the March 28, 2006 CMS notice (CMS Ex. 4) was a reconsideration determination to continue with the termination on March 28, 2006. P. Brief at 1-4. Petitioner's position is that the March 28, 2006 CMS notice triggered the running of a new 60-day period for requesting a hearing and its May 25, 2006 request fell within that period and was timely.

I am not persuaded by Petitioner's arguments. Reconsideration was not available to Petitioner. The Secretary has by regulation limited the availability of requests for reconsideration to "a prospective provider or supplier, or a hospital seeking to qualify to claim payment for all emergency hospital services furnished in a calendar year, . . ." 42 C.F.R. § 498.22(a). Petitioner was a home health agency that participated in Medicare

until its termination. Petitioner was clearly not a "prospective" provider or supplier as it was already participating in the Medicare program and was terminated. Petitioner was also clearly not a hospital. The plain language of the regulation shows that "reconsideration" was not a procedural due process mechanism available to Petitioner.

Petitioner's argument can also be construed to be that the March 3 and March 28 CMS letters reflected reopened and revised determinations that would trigger new 60-day clocks. This argument is also without merit given the facts of this case. Pursuant to 42 C.F.R. § 498.30, CMS may not reopen an initial or reconsidered determination that a prospective provider is a provider or that a hospital qualifies to claim payment for emergency services furnished during a calendar year – neither prohibition applies here. CMS may on its own initiative reopen **any other initial** or reconsidered determination within 12 months after the date of notice of the initial determination. 42 C.F.R. § 498.30 (emphasis added). Contrary to the assertions of CMS (CMS Reply at 3), reopening is not limited to reconsideration decisions. Reopening does not require a request from an aggrieved party and the procedure is not limited to prospective providers or suppliers or hospitals like the reconsideration procedures set forth at 42 C.F.R. §§ 498.22-498.25.

CMS argues that no CMS official ever reopened or revised the initial determination embodied in its letter of January 11, 2006. CMS Reply at 3-4. I agree that the evidence fails to show that a reopening or revision occurred in this case.

The regulation requires that CMS give notice of reopening and any revision of the reopened determination. 42 C.F.R. § 498.32(a). The regulation does not specify that CMS give notice of reopening in advance of any revision or provide an opportunity for an affected party to participate in the decision to reopen and revise a prior initial or reconsidered determination. At first blush, the CMS letters of March 3, 2006, March 17, 2006, and March 28, 2006 (CMS Exs. 2, 3, and 4) can be misconstrued to be evidence of reopening and revision by CMS, just as Petitioner has misconstrued them. The letters refer to the initial determination, indicate that evidence was received from Petitioner in the form of a plan of correction, that the plan of correction was considered, in the case of the March 3 letter the date of termination was moved to March 24, 2006, and all the letters show that CMS decided to continue with termination of Petitioner's participation. However, careful review of the series of letters show that no reopening or revision was intended by CMS and reopening and revision never occurred in this case.

The right to request a hearing is triggered by notice of one of the initial determinations enumerated at 42 C.F.R. § 498.3(b), in this case specifically 42 C.F.R. § 498.3(b)(8). *See also*, 42 C.F.R. §§ 498.5(b) and (e). Administrative actions that do not amount to initial determinations, examples of which are cited at 42 C.F.R. § 498.3(d), do not trigger appeal rights. In this case, the January 11, 2006 CMS letter gave Petitioner notice of the initial determination that CMS would terminate Petitioner's participation in Medicare and of the

right to request review of that determination by an ALJ. The January 11 letter also advised Petitioner of the procedure to be followed in order for CMS to reopen and revise its initial determination to terminate. The procedure set forth in the January 11 letter was that Petitioner could submit an allegation of compliance and/or a plan of correction and, if CMS found the allegation credible, it would authorize the state to resurvey Petitioner. Implicit is the notion that if CMS was satisfied that Petitioner had returned to substantial compliance, CMS would then consider not effectuating the termination remedy. CMS Ex. 1. The CMS letters, dated March 3, March 17, and March 28, do not show that CMS considered not terminating Petitioner's participation. The March 3 letter makes this clear. According to the March 3 letter, CMS received Petitioner's January 20, 2006 plan of correction and it was found acceptable, but a revisit survey was conducted and Petitioner continued to be out of compliance with program requirements. CMS Ex. 2, at 1. Because Petitioner was found out of compliance by the revisit survey, there was simply no reason for CMS to reopen or revise its decision to terminate. Furthermore, there is no regulatory, statutory, or other requirement that CMS reopen and revise an initial determination to terminate based solely upon the submission of an allegation of compliance and/or a plan of correction or the unfavorable findings of a revisit survey. The extension of the date of termination, whether for CMS's convenience or to grant Petitioner some additional time to demonstrate compliance, was in the nature of an administrative action such as the examples provided at 42 C.F.R. § 498.3(d) and not a change in the initial determination to terminate.

It is also apparent from the CMS letters of March 3, March 17, and March 28, 2006 that CMS made some effort to avoid triggering new 60-day appeal periods with those letters. All three letters refer Petitioner to the statement of appeal rights set forth in the January 11 letter, rather than advising Petitioner of those rights again. This gives credibility to the CMS position that only the January 11 letter was intended to be notice of an appealable initial determination.[4]

After considering the positions of the parties and the documents, I conclude that the CMS letters of March 3, 17, and 28, 2006, did not show that CMS engaged in reopening and/or revision of the initial determination announced in its letter of January 11, 2006. Accordingly, I conclude that the March 28, 2006 CMS letter did not trigger a new 60-day period in which Petitioner could request a hearing. Petitioner's May 25, 2006 request for hearing was untimely and good cause for an extension of the time for appeal has not been shown.

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[4] I note that the CMS correspondence in this case deviates from the usual government practice of using a subject-line. Use of a proper subject-line that clearly indicates the subject and/or purpose of correspondence may help reduce confusion about the purpose of the correspondence.

III. Conclusion

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

/s/

Keith W. Sickendick
Administrative Law Judge