

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Shields Richmond Nursing Center,)	Date: July 10, 2009
(CCN: 05-5292))	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-371
)	Decision No. CR1973
Centers for Medicare & Medicaid)	
Services.)	
_____)	

DECISION

I dismiss the hearing request filed by Petitioner, Shields Richmond Nursing Center. I do so because Petitioner did not file a timely hearing request and has not shown good cause for its failure to file a timely hearing request.

I. Background

Petitioner is a long-term care facility located in Richmond, California. A compliance survey of Petitioner was conducted by the California Department of Health Services (state survey agency) on or about February 7, 2007, and on April 10, 2007. By letter dated February 22, 2007, the state survey agency notified Petitioner that it was not in compliance with federal participation requirements for nursing homes, and that it was recommending various remedies.

By letter dated May 1, 2007, CMS notified Petitioner that it concurred with the recommendations of the state survey agency, and that it was imposing, among other remedies, a per instance civil money penalty (CMP) of \$10,000. CMS further informed Petitioner that if it disagreed with the determination, a hearing was available before an administrative law judge (ALJ) pursuant to 42 C.F.R. Part 498, and that a written request for a hearing must be filed no later than 60 calendar days from the date of receipt of notice.

Petitioner then engaged in informal dispute resolution (IDR) relative to the deficiency findings of both the February 7, 2007 and April 10, 2007 surveys. Ultimately, the state survey agency upheld the scope and severity level of the deficiency findings of the February 7, 2007 survey, however, it reduced the scope and severity level of the deficiency findings of the April 10, 2007 survey.

Based on the reduction of the scope and severity level of the findings of the April 10, 2007 survey, CMS informed Petitioner in a June 20, 2007 letter that the deficiency findings and remedies from the survey completed on April 10, 2007, had been rescinded. In the same letter, Petitioner was reminded that the deficiencies and remedies from the February 7, 2007 survey still remained, and that any request for a hearing challenging the findings of noncompliance resulting from the February 7, 2007 survey, had to be filed no later than 60 calendar days from receipt of the May 1, 2007 notice letter.

By letter dated March 4, 2008, CMS advised Petitioner that because it failed to timely request a hearing challenging CMS's findings of noncompliance from the February 7, 2007 survey, the per instance CMP in the amount of \$10,000 that was imposed as a result of the findings of noncompliance was now due and payable on March 19, 2008.

By letter dated March 17, 2008, Petitioner requested a hearing, and provided an explanation as to why it did not file an appeal earlier.

By letter dated March 26, 2008, Petitioner requested an extension of time to file its hearing request.

On April 14, 2008, the case was assigned to me for hearing and decision.

CMS filed a motion to dismiss Petitioner's hearing request on the basis of untimeliness, along with a brief (CMS Br.) and nine attached exhibits. Petitioner filed a response brief (P. Br.) along with seven supporting exhibits opposing CMS's motion to dismiss. Without objection from the parties, I admit into evidence CMS Exhibits (CMS Exs.) 1-9, and Petitioner Exhibits (P. Exs.) 1-7.

After consideration of the parties' written arguments, documentary evidence, and applicable law, I grant CMS's motion to dismiss. In doing so, I find that Petitioner's hearing request was untimely filed and the time for filing a request for hearing has not been extended as Petitioner has not shown good cause for its failure to file a timely hearing request.

II. Issues

The issues in this case are:

Whether Petitioner filed a timely request for hearing, and if not;

Whether Petitioner has shown good cause for receiving an extension of time to file a request for hearing.

III. Applicable law and regulations

In cases involving CMS, a party is entitled to a hearing only if that party files its request within the time limits established by 42 C.F.R. § 498.40(a)(2), unless the period for filing is extended. In order to be entitled to a hearing, a party must file its request within 60 days from receipt of a notice of a determination by CMS to impose a remedy. The date of receipt of a notice is presumed to be five days after the date on the notice, unless there is a showing of actual receipt on an earlier or later date. 42 C.F.R. § 498.22(b)(3). An ALJ may extend the time within which a hearing request may be filed based on a showing of good cause to justify an extension of time. 42 C.F.R. § 498.40(c)(2). An ALJ may dismiss a request for hearing which is not timely filed. 42 C.F.R. § 498.70(c).

IV. Findings and Discussion

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each finding below as a separately numbered heading. I discuss each Finding in detail.

1. Petitioner is not entitled to a hearing because it did not file a timely hearing request.

CMS faxed Petitioner a notice of deficiencies along with the remedies it determined to impose on May 1, 2007. P. Ex. 2. Petitioner does not dispute that it actually received the notice on May 2, 2007. CMS Ex. 7, at 3. It was not until March 17, 2008, 260 days after Petitioner's receipt of CMS's notice letter, that Petitioner filed a request for a hearing before an ALJ.

42 C.F.R. § 498.40(a)(2) expressly provides that:

[an] affected party or its legal representative or other authorized official must file the request for hearing in writing within 60 days from the receipt of the notice of initial, reconsidered, or revised determination unless that period is extended

The filing of Petitioner's request was clearly well beyond the 60 day period required by the regulations. Petitioner's receipt of the notice letter on May 2, 2007, required it to file a request for an administrative hearing no later than July 1, 2007.

2. Petitioner has not established good cause for me to extend the deadline for it to file a hearing request.

If the hearing request was not filed within 60 days, the affected party or its legal representative may file with the ALJ a written request for an extension of time stating the reasons why the request was not filed timely. 42 C.F.R. § 498.40(c)(1). An ALJ may extend the time within which a hearing request may be filed based on a showing of good cause to justify an extension of time. 42 C.F.R. § 498.40(c)(2). Petitioner did indeed file a request for an extension of time to appeal the CMS determinations from the February 7, 2007 survey. However, Petitioner filed the request on March 26, 2008, 269 days after the receipt of CMS's notice letter and after it had filed its request for hearing. CMS Ex. 9. Petitioner believes that it acted in good faith and that it had legitimate reasons for not requesting a hearing within the statutory guidelines. Specifically, Petitioner explains that:

the state survey agency's letter of February 22, 2007, states that remedies would be recommended to CMS if substantial compliance had not been achieved when the facility was re-surveyed, and that penalties were to be imposed *if* it was determined that Petitioner was not in substantial compliance with Medicare participation requirements on March 7, 2007;

CMS's letter of June 20, 2007, indicated that as a result of IDR the remedies during the April 10, 2007 survey had been rescinded; and therefore it did not request a hearing to challenge the certification/findings of noncompliance based on the February 7, 2007 survey because of its belief that it had been given an opportunity to correct by the state.

Petitioner argues that it reasonably relied on representations that no penalties would be imposed if compliance was achieved, and that the delay in requesting a hearing was caused by the, "[state survey agency and CMS's] own words and actions alone which have created confusion and ambiguity that gives rise to this seemingly [*sic*] Motion to Dismiss." P. Br. 5.

The fundamental issue to be decided here is whether Petitioner has shown good cause for me to extend the time to file a request for hearing beyond the 60 days provided in the regulations. 42 C.F.R. §§ 498.40(c)(1), (c)(2). Good cause is not defined in the regulations. However, the Departmental Appeals Board has held that "good cause" means circumstances beyond an entity's ability to control which prevented it from making a timely request for hearing. *Cary Health and Rehabilitation Center*, DAB No. 1771 (2000); *Hospicio San Martin*, DAB No. 1554 (1996).

Thus, I examine the facts of this case to determine what circumstances, if any, beyond Petitioner's control, prevented it from filing a timely hearing request. Petitioner's essential argument is that the state survey agency and CMS's confusing and ambiguous notice letters caused it to believe that penalties would only be imposed if it failed to be in compliance with the revisit survey. P. Br. 4-5.

The notices of imposition of sanctions dated May 1, 2007 and June 20, 2007, advised Petitioner that its facility had a right to contest the findings of noncompliance that resulted in the imposition of remedies, by filing a written request within 60 days of receipt of such notices. CMS Exs. 1, 5.

The notice letters unequivocally refer to the specific section of the regulation that establishes that Petitioner has 60 days from the receipt of the notice to appeal the agency action. Petitioner has to show that it was prevented from filing a timely request for hearing due to circumstances beyond its control. *Hospicio San Martin*, at 2. Petitioner has maintained from the beginning that it was the state survey agency's ambiguous and poorly written notice letter of February 22, 2007, that started a series of misunderstandings that ultimately caused it to file out of time, and therefore, good cause exists for me to extend the time to file a request for hearing. Petitioner's arguments are without merit. A plain reading of the notice letters and the regulatory language regarding Petitioner's appeal rights, leads me to conclude that Petitioner simply did not read the information carefully. Petitioner's reliance on the state survey agency's letter written and sent prior to CMS's initial determination letter of May 1, 2007, which actually imposed remedies, is unreasonable and illogical. The state survey agency's letter of February 22, 2007, is not ambiguous. The letter states in part that:

[r]emedies will be recommended for imposition by the Centers for Medicare & Medicaid Services (CMS) Regional Office and/or the State Medicaid Agency if your facility has failed to achieve substantial compliance

P. Ex. 1, at 2.

The plain meaning of this section is that remedies would be imposed if Petitioner failed to achieve substantial compliance. Remedies were imposed and Petitioner was placed on notice of those remedies by CMS's letter of May 1, 2007. Petitioner subsequently sought to resolve the allegations of noncompliance through IDR. Petitioner was then advised by CMS by letter dated June 20, 2007, that remedies from the April 10, 2007 survey were rescinded, but that the findings of noncompliance and remedies from the February 7, 2007 survey still remained. Indeed, the letter states plainly that:

[w]e remind you that since the notice was faxed to you by facsimile on May 1, 2007, your appeal must be filed no later than sixty (60) days from the date indicated on that notice.

CMS Ex. 5, at 3.

Thus, Petitioner was clearly advised that it still had not achieved substantial compliance and that remedies would be imposed. Moreover, if Petitioner's status was still unclear, it was specifically reminded that it must file an appeal within 60 days of the May 1, 2007 notice. Therefore, upon receipt of the June 20, 2007 notice letter, Petitioner still had 11 days in which to file a request for hearing. Despite this reminder, Petitioner did not file a hearing request. Indeed, if Petitioner questioned whether or not it needed to request a hearing, it should have followed the instructions in the May 1, 2007 and June 20, 2007 letters which provided the name and number of a CMS employee in which it could ask questions. CMS Ex. 1, at 5; CMS Ex. 5, at 3. Petitioner contends that by phone call and e-mail a CMS representative, "was made aware of Petitioner's position and responded informally and without apparent authority to explain the details of CMS's position." P. Br. 3. Petitioner implies that a CMS representative gave it misleading information. However, CMS's e-mail of August 22, 2007, merely recites the same information contained in its notice letters, and does not provide any information to the contrary. P. Ex. 4. Petitioner's willful or negligent failure to understand the clear and plain language of the June 20, 2007 letter from CMS does not establish good cause for me to grant an extension of time to receive Petitioner's request for hearing.

