

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:)	DATE: June 10, 2009
)	
Capitol House Nursing and)	
Rehab Center,)	
Petitioner,)	
)	Civil Remedies CR1866
)	App. Div. Docket No. A-09-49
)	
)	Decision No. 2252
- v. -)	
)	
Centers for Medicare &)	
Medicaid Services.)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Capitol House Nursing and Rehab Center (Capitol House) appealed the November 17, 2008 decision of Administrative Law Judge (ALJ) Steven T. Kessel, DAB CR1866 (2008) (ALJ Decision). The ALJ dismissed the case based on Capitol House's persistent failure to comply with the regulations governing hearing requests set forth at 42 C.F.R. § 498.40(b) and the absence of any good cause for Capitol House's failure to comply with those regulatory requirements. ALJ Decision at 1. For the reasons discussed below, we affirm the ALJ Decision.

Applicable Law

Sections 1819(a)-(d) of the Social Security Act (Act) and the implementing regulations at 42 C.F.R. Part 483 contain the requirements that a skilled nursing facility (SNF) must meet in order to participate in the Medicare program. The Act and

regulations specify administrative remedies that the Centers for Medicare and Medicaid Services (CMS) may impose when it determines that a SNF is not in substantial compliance with program participation requirements. Act, § 1819(h); 42 C.F.R. Part 488, subpart F. A facility may appeal CMS's initial determination of noncompliance leading to the imposition of certain administrative remedies, but administrative actions that are not CMS initial determinations are not subject to appeal. 42 C.F.R. §§ 488.408(g), 498.3(b)(13), 498.3(d). An affected party seeking to challenge a CMS initial determination of noncompliance must file a written request for an ALJ hearing within 60 days from its receipt of the notice of initial, reconsidered, or revised determination by CMS. 42 C.F.R. § 498.40(a).

Section 498.40(b) specifies that the hearing request must:

- 1) Identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and
- 2) Specify the basis for contending that the findings and conclusions are incorrect.

Section 498.40(c) further provides that the ALJ may extend the time for filing a request for hearing for good cause shown. An ALJ may dismiss a hearing request entirely or as to any stated issue if the affected party did not timely file a hearing request and the time for filing has not been extended for good cause. 42 C.F.R. § 498.70(c). An ALJ may also dismiss a hearing request where a party does not have a right to a hearing. 42 C.F.R. § 498.70(b). An ALJ's dismissal of a hearing request is binding unless it is vacated by the ALJ or the Board. 42 C.F.R. § 498.71(b).

The Board has sustained ALJ dismissals of hearing requests that failed to comply with sections 498.40(b)(1) and (2). See, e.g., Birchwood Manor Nursing Center, DAB No. 1669 (1998), aff'd, Birchwood Manor Nursing Center v. Dep't of Health and Human Servs., No. 98-60695 (5th Cir. June 29, 1999). The Board has also sustained the dismissal of a hearing request where a petitioner did not contest an initial determination by CMS and, therefore, did not have a right to a hearing under section 498.70(b). See High Tech Home Health, Inc., DAB No. 2105 (2007), aff'd, High Tech Home Health, Inc. v. Leavitt, Civ. No. 07-80940 (S.D. Fla. Aug. 15, 1990). The Board has also held that under section 498.70(c), an ALJ has discretion not to

dismiss a hearing request that fails to meet one or both criteria of section 498.40(b), based on the particular circumstances presented in a given case. See Fairview Nursing Plaza, Inc., DAB No. 1715 (2000); Alden-Princeton Rehabilitation & Health Care Center, Inc., DAB No. 1709 (1999). The Board in those cases cited as circumstances where an ALJ had discretion not to dismiss the case situations where defects in the hearing request were subsequently remedied by the submission of additional documents, CMS had waived its objection to the request, or the facility may have reasonably concluded that its request was sufficient based on the course of the proceedings. Id.

Factual Background

The following undisputed facts are drawn from the ALJ Decision and the record below.¹

Capitol House is a SNF located in Baton Rouge, Louisiana, that is certified to participate in the Medicare program. The Louisiana Department of Health & Hospitals (LDHH) conducted a survey at Capitol House that was completed on February 29, 2008. CMS's Br. at 3. Based upon the survey results, CMS made specific findings of noncompliance and determined to impose a civil money penalty, and possibly other remedies, against Capitol House. Id.; ALJ Decision at 1-2, 3.

On May 19, 2008, Capitol House filed a one-page letter requesting a hearing to challenge "the agency's findings" as set forth in an attached letter dated May 13, 2008 regarding the results of an informal dispute resolution (IDR) session in connection with the survey of February 29, 2008. On October 2, 2008, CMS filed a Motion for Summary Judgment or Alternatively, Motion for Further Development (MSJ). The gravamen of CMS's motion was that Capitol House's hearing request failed to identify the factual or legal basis for challenging CMS's findings or the imposition of administrative remedies as required by section 498.40(b). ALJ Decision at 2. CMS also stated in its MSJ that "[f]rankly, from the drafting of petitioner's appeal letter, it is not clear" that Capitol House

¹ Neither Capitol House nor CMS has provided a copy of the Statement of Deficiencies or CMS's initial determination seeking to impose civil money penalties and/or other administrative remedies in this case. Any references to CMS's findings are based on the parties' representations in their pleadings and the ALJ Decision.

even sought to appeal an initial determination of noncompliance by CMS "since the [attached IDR] letter referenced [had] originated at [L]DHH." MSJ at 8.

Before us, Capitol House states that: "In reaction to [CMS's MSJ, Capitol House] filed its Revised Appeal Notice [on October 30, 2008] in order to cure any potential defect [in its initial hearing request]." P. Br. at 3. A day later, Capitol House filed a brief opposing CMS's MSJ. Capitol House contends here that "when read in context of the [IDR] notice provided," both the hearing request and its revised hearing request were legally sufficient based on the Board's decisions in Alden-Princeton and Fairview. Id. at 2, 4.

ALJ Decision

In a written decision dated November 17, 2008, the ALJ dismissed the case "as a consequence of Capitol House's persistent failure to comply with the requirements governing hearing requests stated at 42 C.F.R. § 498.40(b) and also, because of the absence of any good cause for Capitol House's failure to comply with the regulation's requirements." ALJ Decision at 1. In particular, the ALJ found that "[t]here is absolutely nothing in either Capitol House's initial hearing request or in its amended appeal notice which identifies the fact findings or conclusions [of law] that Capitol House is challenging and, also, the request and amended appeal notice are absolutely silent as to why Capitol House believes CMS's determinations to be wrong." Id. at 4. The ALJ concluded that to give Capitol House a "third bite at the apple" so that it could file an acceptable hearing request "might be an exercise in futility given Capitol House's refusal thus far to file one." Id. at 5.

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence on the record as a whole, and a disputed conclusion of law to determine whether it is erroneous. See Departmental Appeals Board, Guidelines-- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs, <http://www.hhs.gov/dab/guidelines/prov.html>. We review an ALJ's exercise of discretion to dismiss a hearing request, where such dismissal is authorized by law, for abuse of discretion. See High Tech Home Health, Inc. at 7-8 and cases cited therein.

Analysis

A. Capitol House does not have a right to a hearing because its initial and revised hearing requests failed to appeal an initial determination of noncompliance by CMS.

Capitol House contends that its initial hearing request met the requirements of section 498.40(b) based upon the Board's interpretation of that regulation in Alden-Princeton and Fairview. Capitol House points out that in these two cases, the Board ruled that in order "to assess the [legal] sufficiency of a hearing request, the ALJ must first determine whether the language of the hearing request, **when read in the context of the notice**, meets the requirements set forth in the plain language of 42 C.F.R. § 498.40(b)." P. Br. at 2 (emphasis in original). Capitol House similarly contends that its revised hearing request is legally sufficient under Fairview.

The Board's decisions in Alden-Princeton and Fairview offer no support for Capitol House. The "notice" referred to in those decisions is CMS's notice of its initial determination to impose remedies for a facility's noncompliance. Fairview at 4-5; Alden-Princeton at 2. CMS's notice was attached to the hearing requests at issue in these two Board decisions. Id. In this case, however, the notice that Capitol House refers to in its hearing requests is an attached letter from LDHH dated May 13, 2008 that announced the results of the IDR process, not CMS's notice letter.² The LDHH letter is not an initial determination by CMS and, thus, does not trigger any appeal rights under 42 C.F.R. Part 498. The regulations provide that a provider may appeal only an initial determination made by CMS. The IDR result from LDHH is not an administrative action by CMS that may be appealed to an ALJ. See 42 C.F.R. §§ 498.3(b)(13), 498.3(d), 498.40(a); High Tech Home Health, Inc. at 7-8. Thus, Capitol House's hearing requests are clearly distinguishable from the facts in Fairview and Alden-Princeton and any other decision where a facility's hearing request, read together with CMS's

² Capitol House's initial hearing request states: "We do hereby appeal the agency's findings as set forth in the attached correspondence of May 13, 2008 [from LDHH] and request a hearing." Capitol House contends here that its initial hearing request "clearly requested a review of that [attached IDR] decision." P. Br. at 2. Capitol House's revised hearing request similarly sought to challenge the IDR results and contained the same IDR letter from LDHH as an attachment.

appealable initial determination, sufficiently identified what CMS findings were in dispute.

Because Capitol House did not seek to contest an initial determination of noncompliance by CMS within the meaning of section 498.3(b)(13), we find that Capitol House does not have a right to a hearing under Part 498 based upon either its initial or revised hearing requests and that the ALJ properly dismissed the hearing request as amended. See High Tech Home Health, Inc. (affirming ALJ's dismissal of hearing request under section 498.70(b) where petitioner did not appeal an initial determination made by CMS).

B. The ALJ did not abuse his discretion in dismissing the case because Capitol House had sufficient opportunity to timely file a legally sufficient hearing request, as required by section 498.40(b).

As discussed above, the ALJ could have dismissed the hearing request based solely on Capitol House's failure to appeal an initial determination by CMS. However, we also agree with the ALJ that the revised hearing request is subject to dismissal on the ground it does not meet the requirements of section 498.40(b).

The initial hearing request failed to identify the specific issues and findings of fact and conclusions of law with which Capitol House disagrees, as required by section 498.40(b)(1). Capitol House contends that "[b]y attaching the May 13, 2008, [IDR] letter [from LDHH] which delineated the specific tags involved," it "gave notice to CMS of the specific issues to be disputed." P. Br. at 2. However, the test of the sufficiency of a hearing request is not whether CMS is able to know what deficiencies are being contested, but whether the hearing request meets the requirements of section 498.40(b). See Alden-Princeton at 12.

Moreover, as previously discussed, the referenced IDR results are not a CMS initial determination of noncompliance that is subject to appeal. CMS is not bound by the results of the IDR process conducted by a State and may initiate an enforcement action based upon its own review and acceptance of all or part of the survey and IDR results. 42 C.F.R. § 488.452(a)(2). Even if Capitol House's reference to the IDR results could somehow be viewed as identifying the findings of fact and conclusions of law regarding the February 29, 2008 survey with which Capitol House disagrees, however, the initial hearing request does not

specify any basis for disagreeing with those findings and conclusions, as required by section 498.40(b)(2).

Capitol House's revised hearing request fails for the same reasons. Although Capitol House contends that it cured any defect by using language in its revised hearing request that the Board found acceptable in Fairview,³ it is abundantly clear in Fairview and its progeny that whether a particular hearing request should be accepted as sufficient to meet the regulatory requirements depends upon the facts of each case. The use of "boilerplate" language that was acceptable under the facts and circumstances present in Fairview does not guarantee that the same language will be sufficient in a different case with different facts and circumstances. For the reasons discussed above, the facts in the present case are clearly distinguishable from Fairview and Alden-Princeton and do not support a finding that Capitol House's revised hearing request was legally sufficient under the present facts.⁴ Thus, we conclude that the ALJ did not err in determining that Capitol House's initial and revised hearing requests were not legally sufficient under section 498.40 (b).

³ The revised hearing request states:

The hearing is requested in regard to all deficiencies and findings of non-compliance in this matter. The facility is contesting the findings of fact for each example cited and also the conclusions reached that those findings were a violation of each tag number cited. The basis for the facility's contention is that the findings of fact are inaccurate and that there are additional facts which would negate the conclusions that deficiencies existed.

⁴ In addition to the central distinguishing fact that Capitol House's revised hearing request, unlike the hearing requests in Fairview and Alden-Princeton, cites to IDR results rather than CMS's findings of noncompliance, Capitol House's revised hearing request was not filed within 60 days from its receipt of the notice of CMS's initial determination, as required under 42 C.F.R § 498.40(a)(2). Instead, Capitol House waited over five months from the date of its initial hearing request on May 19, 2008 before filing its revised hearing request on October 30, 2008. Capitol House has not provided any explanation of why it could not have submitted a complying request sooner.

Capitol House's contention that the ALJ abused his discretion in dismissing the case because the IDR notice letter from the LDHH did not contain any instructions for filing an appeal from the IDR decision is without merit. As previously discussed, the regulations do not provide authority for a facility to appeal the results of an IDR. Therefore, the fact that the IDR notice letter did not contain any instructions for appealing the IDR decision by LDHH is simply not relevant to whether Capitol House has a right to a hearing under Part 498 to challenge an initial determination made by CMS.

The Board has previously concluded that the language of section 498.70 gives an ALJ discretion not to dismiss a case based on the particular circumstances surrounding a facially defective hearing request. See Alden-Princeton at 12, 15. Similarly, an ALJ has authority under section 498.70 either on his or her own motion or on a motion of a party, to determine whether a party has a right to a hearing. Therefore, the ALJ implicitly has discretion to permit a party to file an amended pleading to meet the regulatory requirements under sections 498.40(b) or 498.70. However, this does not mean that a party has a right to repeated opportunities to file a legally sufficient hearing request. In other words, the regulations do not compel an ALJ to automatically dismiss a hearing request that is facially defective or otherwise not in compliance with regulatory requirements, but neither do they compel an ALJ to provide unlimited opportunities to correct the defects.

In this case, Capitol House repeatedly failed to file a hearing request that complied with section 498.40(b). In its MSJ, CMS provided notice to Capitol House that one of the defects in its initial hearing request was that it was not seeking to appeal an initial determination by CMS but a decision by LDHH in connection with the IDR process. See CMS's MSJ at 8. Despite this notice from CMS, Capitol House did not cure the defect in its revised hearing request by seeking to appeal the initial determination of noncompliance by CMS in this case. Instead, Capitol House apparently ignored CMS's argument and simply reattached the same IDR notice letter from LDHH in an attempt to appeal the results of the IDR process. Capitol House could not reasonably have believed that its revised hearing request was legally sufficient based upon the course of the proceedings, given the clear regulatory requirements and the notice contained in CMS's MSJ. We agree with the ALJ here that Capitol House had notice and a sufficient opportunity to file a legally sufficient hearing request and through its own actions, contrary to clear regulatory requirements, failed to take advantage of that

opportunity. We also agree with the ALJ's statement that "[t]o order Capitol House now to file an acceptable hearing request might be an exercise in futility given Capitol House's refusal thus far to file one." ALJ Decision at 5.

Accordingly, we conclude that the ALJ's dismissal of the case based upon Capitol House's failure to file a hearing request in compliance with regulatory requirements, even many months after the due date, was well within his discretion.

Conclusion

For the reasons explained above, we uphold the ALJ Decision and affirm and adopt each of the ALJ's findings of fact and conclusions of law.

_____/s/_____
Judith A. Ballard

_____/s/_____
Sheila Ann Hegy

_____/s/_____
Stephen M. Godek
Presiding Board Member