

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Canton Healthcare Center,	)	DATE: November 13, 1996
Petitioner,	)	
- v. -	)	Docket No. C-96-266
Health Care Financing	)	Decision No. CR443
Administration.	)	

DECISION

During the initial prehearing conference with the parties, I raised the issue of whether Petitioner's hearing request was untimely filed. According to the jurisdictional documents before me at that time, Petitioner's hearing request was dated May 6, 1996, whereas the notice of adverse determinations from the Health Care Finance Administration (HCFA) was dated January 23, 1996.<sup>1</sup> Petitioner represented during the conference that it had not been aware of the timeliness issues, and, therefore, it was unable to explain why it had filed its hearing request outside of the 60-day period specified by 42 C.F.R. § 498.40(a)(2). Accordingly, I granted Petitioner the opportunity to evaluate the matter further in order to file an appropriate response to my concerns on the timeliness issue.

Petitioner submitted a letter dated July 12, 1996, along with documents marked as Petitioner's Exhibits A through F (Ex. A - F of P.'s July 12, 1996 letter). Petitioner argued that HCFA had failed to properly and timely notify Petitioner of its hearing rights. Accordingly, Petitioner asked that I find its hearing request timely filed and that I vacate the adverse determinations made by HCFA against Petitioner.

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<sup>1</sup> Petitioner's hearing request was sent to HCFA and then forwarded by HCFA to the Departmental Appeals Board (DAB). In addition, HCFA forwarded to the DAB a copy of HCFA's January 23, 1996 notice letter along with Petitioner's hearing request.

Thereafter, HCFA filed a motion to dismiss the hearing request, along with HCFA's supporting memorandum and three exhibits (HCFA Ex. 1 - 3). Petitioner responded by sending another letter to me, which was dated September 5, 1996 and accompanied by additional documents also marked as Petitioner's Exhibits A through I (Ex. A - I of P.'s September 5, 1996 letter). HCFA then filed a reply memorandum with four additional exhibits (HCFA Ex. 4 - 7).

In its reply memorandum, HCFA requested leave to substitute its Exhibit 4 for its Exhibit 1, due to the inadvertent omission of the last page from Exhibit 1.<sup>2</sup> In addition, HCFA moved to strike all of Petitioner's exhibits due to Petitioner's failure to follow the Procedures required for litigation in this forum. By letter dated October 3, 1996, Petitioner submitted an amended response to HCFA's motion to dismiss, with amended exhibits (Ex. A - I of P.'s October 3, 1996 letter). Despite the remaining problems with Petitioner's exhibits,<sup>3</sup> I have decided to allow the admission of all exhibits as marked and submitted by the parties. To strike Petitioner's exhibits or to remark them at this time would render Petitioner's arguments

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<sup>2</sup> For good cause shown, I am granting HCFA's request for substitution.

<sup>3</sup> In submitting documents as exhibits, Petitioner has failed to satisfy the identification requirements contained in the Procedures adopted by the Civil Remedies Divisions of the Department Appeals Board.

In addition, Petitioner has also used the same identifier for different documents. As examples, I note that Petitioner attached Exhibits A through F to its letter dated July 12, 1996 and then used some of the same exhibit designations on different documents submitted with its October 3, 1996 letter. Petitioner's Exhibit G, submitted with its October 3, 1996 letter, also contains its own Exhibits A and B, which are distinct from those other documents also designated as Exhibits A and B by Petitioner.

Many of Petitioner's exhibits are also duplicates of documents Petitioner and HCFA have already submitted. For example, Petitioner has remarked and resubmitted HCFA's Exhibits 1 and 2 as Petitioner's Exhibits A and D, respectively; most of the documents included in Petitioner's Exhibit G duplicate those exhibits earlier submitted by Petitioner with its letter dated July 12, 1996, as well as those documents Petitioner has submitted as its Exhibit E and F to its October 5, 1996 letter.

incomprehensible and may result in additional proceedings.

For the reasons which follow, I deny Petitioner's motion to find that the hearing request was timely filed. Instead, I grant HCFA's motion and dismiss the above-captioned case pursuant to 42 C.F.R. § 498.70(c).

#### FINDINGS

1. By letter dated January 23, 1996, HCFA set forth its determinations adverse to Petitioner. HCFA Ex. 4.
2. Petitioner filed a hearing request dated May 6, 1996. HCFA Ex. 3.
3. Petitioner's hearing request dated May 6, 1996 is intended to challenge the determinations set forth by HCFA in its notice letter dated January 23, 1996. HCFA Ex. 3; section A of "Analysis" and citations therein.
4. The timeliness of Petitioner's hearing request dated May 6, 1996 turns on when Petitioner received HCFA's notice dated January 23, 1996. Id.
5. To timely request a hearing in this case, Petitioner needed to file its hearing request within 60 days after it received HCFA's notice dated January 23, 1996. 42 C.F.R. § 498.40(a)(2); section 1866(h) of the Social Security Act (Act)(incorporating section 205(b) of the Act).
6. Petitioner is presumed to have received HCFA's January 23, 1996 notice on January 28, 1996. 42 C.F.R. § 498.40(a)(2)(incorporating 42 C.F.R. § 498.22(b)(3)).
7. HCFA proved that on January 25, 1996, it mailed and telefaxed its January 23, 1996 notice to Petitioner. HCFA Ex. 2, 4 - 7; section C of "Analysis" and citations therein.
8. The burden was on Petitioner to show that it did not receive HCFA's January 23, 1996 notice by January 28, 1996. Findings 6 and 7; 42 C.F.R. § 498.22(b)(3).
9. Petitioner has not proven that HCFA's January 23, 1996 notice was received on any date other than January 28, 1996. See, section C of "Analysis" and citations therein.
10. Petitioner has not introduced credible or persuasive evidence in support of its allegation that it never received the January 23, 1996 notice mailed and telefaxed by HCFA on January 25, 1996. Id.

11. Petitioner has not proven that it did not receive HCFA's January 23, 1996 notice until some time within the 60 days prior to its filing a hearing request dated June 6, 1996. Id.

12. HCFA's January 23, 1996 letter satisfies all of the notice requirements specified by regulation and is not materially defective as alleged by Petitioner. 42 C.F.R. § 498.20(a); HCFA Ex. 4; section C of "Analysis" and citations therein.

13. Based on the evidence of record and the presumed date of receipt specified by regulation, Petitioner's hearing request dated May 6, 1996 was not timely filed. Findings 1 - 12.

14. Even if I were to accept as true Petitioner's contention that it did not receive HCFA's January 23, 1996 notice until HCFA filed a copy of it as an exhibit in support of HCFA's motion to dismiss, I would find also that Petitioner's hearing request was not filed within 60 days **after** it alleged it received HCFA's January 23, 1996 notice. P.'s July 12, September 5, and October 3, 1996 letters with attached exhibits; Section D, 1, of "Analysis" and citations therein.

15. Even if I were to accept as true Petitioner's contention that it did not receive HCFA's January 23, 1996 notice until HCFA filed a copy of it as an exhibit in support of HCFA's motion to dismiss, I would find also that no hearing request containing the information required by regulation was ever filed within 60 days of Petitioner's having received a copy of HCFA's January 23, 1996 notice in conjunction with HCFA's motion to dismiss. 42 C.F.R. § 498.40(b); Section D, 2, of "Analysis" and citations therein.

16. Even if I were to accept as true Petitioner's contention that it did not receive HCFA's January 23, 1996 notice until HCFA filed a copy of it as an exhibit in support of HCFA's motion to dismiss, I would find also that Petitioner has failed to timely file any hearing request within the meaning of 42 C.F.R. § 498.40 in challenging the contents of HCFA's January 23, 1996 notice. Findings 3, 4, 14, 15.

17. Petitioner has made no request or good cause showing for me to extend the 60-day filing period pursuant to 42 C.F.R. § 498.40(c). P.'s July 12, September 15, and October 3, 1996 letters; Findings 14 - 16; section B of "Analysis" and citations therein.

18. Petitioner's hearing request is dismissed with prejudice. 42 C.F.R. § 498.70(c); Findings 13 - 17.

ANALYSIS**A. The timeliness issue turns on the relationship between HCFA's notice dated January 23, 1996 and Petitioner's hearing request dated May 6, 1996.**

In its hearing request, Petitioner did not specify which determination issued by HCFA is being challenged. Petitioner stated only:

Regarding the above referenced facility, we hereby request a hearing to contest the remedies and certification issues which led to the enforcement action.

**Hearing Request.**

In the letter acknowledging the receipt of Petitioner's hearing request, the DAB docketed this case as pertaining to "Petitioner's May 6, 1996 request for hearing and the related January 23, 1996 notice of adverse action by the Health Care Financing Administration." Acknowledgement Letter dated May 29, 1996.<sup>4</sup> Because HCFA's January 23, 1996 letter contains notice of HCFA's decision to terminate Petitioner's Medicare participation agreement (HCFA Ex. 4), HCFA's decision was subject to the hearing rights provided by section 1866(h) of the Act and the regulations codified at 42 C.F.R. Part 498 which implement said statutory provision. However, both the statute as well as the implementing regulations make Petitioner's right to a hearing contingent on its filing a request for hearing within 60 days of receiving the notice of HCFA's decision.

Section 205(b) of the Act, as incorporated by section 1866(h) of the Act, states in relevant part:

Any request [for hearing] with respect to such a decision must be filed within sixty days after the notice of such decision is received by the individual making such request.

The implementing regulations state also in relevant parts:

(a) Manner and timing of request. (1) An affected party entitled to a hearing under § 498.5 may file a request for a hearing ....

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<sup>4</sup> See footnote 1.

(2) The affected party or its legal representative ... must file the request in writing within 60 days from the receipt of the notice of initial, reconsidered, or revised determination unless that period is extended in accordance with paragraph (c) of this section. [Presumed date of receipt is determined in accordance with § 498.22(b)(3)].

42 C.F.R. § 498.40(a)(2).

As to the issue of when a notice letter from HCFA is received by an affected party, there exists a rebuttable presumption that receipt will take place on the fifth day. The relevant regulation specifies as follows:

The date of receipt will be presumed to be 5 days after the date on the notice unless there is a showing that it was received earlier or later.

42 C.F.R. § 498.22(c)(3), as incorporated by 42 C.F.R. § 498.40(a)(2).

An administrative law judge is authorized to dismiss a hearing request if the hearing request was "not timely filed." 42 C.F.R. § 498.70(c) (emphasis in original).

In this case, HCFA's motion to dismiss is based on the rebuttal presumption specified by 42 C.F.R. § 498.22(b)(3), as well as on HCFA's showing

a. that HCFA's notice dated January 23, 1996 notice set forth the basis of HCFA's determinations, the effects of HCFA's determinations, and Petitioner's hearing rights, as required by 42 C.F.R. § 498.20(a) (HCFA Ex. 4);

b. that HCFA's notice dated January 23, 1996 was sent by HCFA to Petitioner via U.S. mail on January 25, 1996 in accordance with the regulation which requires the mailing of such notices (HCFA Ex. 5 - 7; 42 C.F.R. § 498.20(a));

c. that HCFA also telefaxed a copy of its termination notice to Petitioner on January 25, 1996 (HCFA Ex. 5);

d. that the record generated by the telefax machine shows that the transmittal of HCFA's letter dated

January 23, 1996 was completed successfully on January 25, 1996 (HCFA Ex. 2); and

e. that Petitioner submitted no request for hearing other than the one dated May 6, 1996 (HCFA Ex. 3).

As contained in its letters to me and in the exhibits attached to those letters, Petitioner's position appears to be that it had never received HCFA's notice letter dated January 23, 1996 until HCFA served Petitioner with a motion to dismiss, to which a partial copy of said notice letter was appended as HCFA's Exhibit 1.<sup>5</sup> Petitioner asserted that the only letter dated January 23, 1996 it had received prior to that time was from the Texas Department of Human Services (the State Agency), which did not advise Petitioner of any hearing rights with HCFA. P.'s July 12, 1996 letter.<sup>6</sup> Petitioner alleged also that HCFA did not inform Petitioner of its hearing rights in HCFA's notice letters dated April 24, 1996 or May 30, 1996, which Petitioner admits to having received. Ex. D and E of P.'s July 12, 1996 letter.

However, as I noted above, the DAB stated in its acknowledgement to the parties that it was docketing what it believed to be Petitioner's challenge to the determinations contained in HCFA's January 23, 1996 notice. Since receiving the DAB's acknowledgement letter dated May 29, 1996, Petitioner has never denied or sought to correct the reference contained in the May 29 acknowledgement letter that Petitioner's May 6, 1996 hearing request was challenging the determinations contained in HCFA's January 23, 1996 notice. Yet, Petitioner alleged for the first time in its July 12, 1996 letter that it had not yet received HCFA's notice dated January 23, 1996.

Also in its letter dated July 12, 1996, Petitioner raised for the first time the existence of HCFA's notices dated April 24 and May 30, 1996. However, having shown the

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<sup>5</sup> HCFA's Exhibit 1 contains the first two pages of the notice letter. With its reply memorandum, HCFA submitted Exhibit 4, which contains all three pages of the letter, as a substitute.

<sup>6</sup> Because there exists a January 23, 1996 letter from HCFA which set forth Petitioner's hearing rights (HCFA Ex. 4) and this case was not docketed based on the existence of any letter from the State Agency, I reject Petitioner's arguments concerning the alleged inadequacies of the State Agency's January 23, 1996 letter.

existence of these additional notice letters, Petitioner has never alleged that its hearing request dated May 6, 1996 was intended to challenge any matters contained in HCFA's notices of April 24 or May 30, 1996.<sup>7</sup> In specifically responding to HCFA's motion to dismiss, Petitioner continued to deny receipt of HCFA's notice dated January 23, 1996. P.'s September 5, 1996 and October 3 letters.

Since August 21, 1996, HCFA has moved to dismiss the hearing request on the basis that the hearing request was challenging the determinations contained in HCFA's January 23, 1996 notice. At no time has Petitioner alleged that its request for hearing dated May 6, 1996 was intended to challenge anything other than the contents of HCFA's January 23, 1996 notice, as argued in HCFA's memorandum in support of its motion to dismiss.

On the basis of what was alleged and not alleged by Petitioner, I conclude that the timeliness issue must be resolved on the basis of the relationship between HCFA's January 23, 1996 notice and Petitioner's hearing request dated May 6, 1996. I do not find it necessary to discuss whether the contents of HCFA's April 24, 1996 letter gave rise to hearing rights as well, since Petitioner has not alleged that it filed a hearing request dated May 6, 1996 because it received HCFA's April 24, 1996 letter or wished to challenge any determination contained in HCFA's April 24, 1996 letter.

**B. Petitioner has not requested an extension of the 60-day filing period.**

As in its July 12, 1995 letter, Petitioner again asked in its September 5, 1996 and October 3, 1996 letters that I find "Petitioner did timely file an appeal based on the fact the 60-day period never started to run since inadequate notice was given." As in its earlier letter, Petitioner renewed its request that I dismiss the adverse determinations made by HCFA against Petitioner due to HCFA's alleged failure to notify Petitioner of its hearing rights. P.'s September 5, 1996 and October 3, 1996 letters.

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<sup>7</sup> The April 24, 1996 notice contains different findings of noncompliance than the January 23, 1996 notice. Ex. D of P. letter of July 12, 1996; HCFA Ex. 4. The May 30, 1990 notice (Ex. E of P. letter of July 12, 1996) does not impose any enforcement remedies and therefore does not give rise to any hearing rights. University Towers Medical Pavilion, DAB CR436 (1996).



Under the regulations, a petitioner is permitted to request an extension of time period for filing a request for hearing:

(c) Extension of time for filing a request for hearing. If the request was not filed within 60 days --

(2) For good cause shown, the ALJ may extend the time for filing the request for hearing.

42 C.F.R. § 498.40(c)(2).

However, by denying having received HCFA's January 23, 1996 notice at the time it filed its hearing request and by asking for a finding that the 60-day period had never begun to run, Petitioner has not attempted to show the requisite good cause for obtaining an extension of the filing period. Nor has Petitioner requested that I extend the filing period of 60 days after Petitioner received the notice in issue. As will be discussed below, Petitioner filed its hearing request in advance of having allegedly received the notice in issue for the first time with HCFA's motion to dismiss. Therefore, I find immaterial to this controversy the regulatory authorization for extending the filing period for good cause shown.

**C. Petitioner has not rebutted the presumption created by regulation and by HCFA's evidence that HCFA's January 23, 1996 notice was received by Petitioner on or about January 28, 1996.**

In its letters responding to the motion to dismiss, Petitioner argued that HCFA's January 23, 1996 notice did not indicate on its face the manner in which it was sent to Petitioner (P.'s September 5, 1996 and October 3, 1996 letters, 1), that an incomplete copy of said notice was included as HCFA's Exhibit 1 (Id.), that Petitioner finds it "impossible to rely on the genuineness of HCFA's exhibits" (id. at 2), and that no proper service of HCFA's January 23, 1996 notice was ever effectuated (id.). These and like arguments have been countered by HCFA in its reply brief and in the exhibits submitted by HCFA, which included an admission that HCFA's counsel had inadvertently omitted the last page of the notice letter in issue while preparing HCFA's Exhibit 1. The record as a whole does not cause me to doubt the genuineness of HCFA's exhibits or HCFA's contention that its January 23, 1996 notice was in fact sent on the day and in the manner stated by HCFA's employees. See, HCFA Ex. 2, 4 - 7. Nor do I find merit in Petitioner's arguments that HCFA's January 23, 1996 notice is defective on its face.

I find that HCFA's January 23, 1996 letter contains the information required by 42 C.F.R. § 498.20. HCFA Ex. 4. Said letter included a section entitled "Appeals Rights," which cited 42 C.F.R. § 498.40 and provided other relevant information concerning the filing of a hearing request. Id. Therefore, Petitioner's complaint that no notice of hearing rights was included in the State Agency's letter of the same date or in HCFA's subsequently dated notices do not apply to the contents of HCFA's January 23, 1996 letter. See P.'s July 12, 1996 letter.

Petitioner argued also that HCFA's January 23, 1996 notice is defective in that the copy supplied by HCFA does not contain the signature of a HCFA official or the telephone number of any HCFA employee responsible for answering questions, and it does not conform to the model letter format contained in the State Operations Manual. P.'s October 3, 1996 letter. As I found above, the contents of HCFA's January 23, 1996 letter meet the requirements of 42 C.F.R. § 498.20. There is no regulatory or statutory requirement for HCFA's notices to conform to any particular model letter format. Nor is there any regulatory or statutory requirement for any HCFA official to sign the notice letter or provide a telephone number for inquiries. HCFA's January 23, 1996 letter does not leave room for doubting that its contents constitute the official determinations of the agency. If Petitioner wanted to ask questions by telephone, it needed to look no further than the stationery on which the letter in issue was sent, which has HCFA's telephone number printed on it. HCFA Ex. 4.

Even though Petitioner correctly noted that HCFA must mail its January 23, 1996 letter as required by 42 C.F.R. § 498.20(a) (P.'s September 5, 1996 letter, 2), this mailing requirement does not mean that HCFA must state on the face of said letter that HCFA was mailing it. Nor does the mailing requirement mean that HCFA is precluded from sending an additional copy to Petitioner via other means, such as by telefax, to ensure that Petitioner receives actual notice of the letter's contents.

In cases such as this where HCFA has mailed the notice as required by regulation, but Petitioner claims not to have received the mailed notice, Petitioner has no basis for objecting to HCFA's having sent a copy of the same notice by other means to Petitioner. If the mailed notice is not received, a substitute copy of the notice, however sent, would begin the period for requesting a hearing upon Petitioner's receiving it. Therefore, whether and when Petitioner received a copy of HCFA's January 23, 1996 notice via telefax is relevant to Petitioner's time period for filing its hearing request.

The affidavits submitted by HCFA adequately establish that HCFA's January 23, 1996 notice was sent by mail in accordance with 42 C.F.R. § 498.20(a), as well as by telefax transmittal to Petitioner. HCFA Ex. 5 - 7. The record generated by the telefax machine during the course of the transmittal shows also that all three pages of HCFA's notice, along with a cover page, was successfully completed on January 25, 1996. HCFA Ex. 2. Accordingly, unless Petitioner proves a later receipt date, Petitioner is deemed to have received HCFA's notice dated January 23, 1996 by no later than January 28, 1996 (five days after the date of the notice). 42 C.F.R. § 498.22 (b)(3) (as incorporated by 42 C.F.R. § 498.40(a)(2)).

Petitioner has not proven a later receipt date.

Even though Petitioner submitted the affidavits of employees who explained the office procedures for processing mail and who stated that they have found no copy of HCFA's January 23, 1996 notice among Petitioner's office records, these affidavits do not establish that the specified mail processing procedures were in effect when HCFA sent its January 23, 1996 letter. Nor do the affiants claim to have had personal knowledge of any relevant event occurring in late January or early February of 1996. Ex. G - I of P.'s September 5, 1996 letter. These affiants do not even state for how long they have been employed by Petitioner.

Even more significantly, none of the affiants stated that Petitioner had not received HCFA's January 23, 1996 notice subsequent to the time HCFA had sent it. Instead, what each affiant stated was: "Our facility never received any correspondence, documents, etc. from HCFA ... or any other addressor or entity dated January 25, 1996." Ex. G - I of P.'s September 5, 1996 letter (emphasis added). There exists no notice from HCFA dated January 25, 1996 relevant to this proceeding, and Petitioner's non-receipt of a document dated January 25, 1996 is immaterial.

In addition, I do not find credible Petitioner's contention that not only did HCFA's January 23, 1996 notice fail to reach Petitioner by mail after HCFA had sent it on January 25, 1996, but a copy of the same document telefaxed by HCFA on January 25, 1996 had failed to reach Petitioner as well. Nothing of record can explain why both the letter as well as the telefax transmission sent on the same day would fail to reach Petitioner. Nothing of record casts sufficient doubt on the accuracy of the record generated by the telefax machine used by HCFA, which shows that the transmission to Petitioner was successfully completed on January 25, 1996.

I note also that, given the other notices received by Petitioner, the facts alleged by Petitioner are not consistent with its position that it failed to receive a copy of HCFA's January 23, 1996 notice until some time after I raised the timeliness issue during the prehearing conference in July of 1996. For example, Petitioner admitted to having received the State Agency's notice dated January 23, 1996, which advised of the State Agency's recommendations that certain enforcement remedies be imposed by HCFA. Ex. B of P.'s July 12, 1996 letter. Said letter from the State Agency especially placed Petitioner on notice that HCFA would be sending a letter to Petitioner concerning which remedies would be imposed by HCFA and their effective dates. Id.

Additionally, HCFA's notice dated April 24, 1996, which Petitioner also admitted to having received, referred to HCFA's January 23, 1996 notice<sup>8</sup> and HCFA's denial of payments for Medicare and Medicaid admissions, which had been in effect since February 7, 1996. Ex. D of P.'s July 12, 1996 letter. As I had noted above, the DAB also sent Petitioner an acknowledgement of hearing request letter dated May 29, 1996 which also referred to HCFA's notice dated January 23, 1996.

If it were true that Petitioner had never received either the mailed or telefaxed copy of HCFA's January 23, 1996 notice, then Petitioner would likely have made inquiries with HCFA concerning the whereabouts of said notice after reading the contents of the State Agency's January 23, 1996 letter, HCFA's April 24, 1996 letter, or DAB's May 29, 1996 acknowledgement letter. (Without having received HCFA's January 23, 1996 notice, Petitioner would not have had advance notice that HCFA was denying payments for Medicare and Medicaid admissions effective February 7, 1996. HCFA Ex. 4 at 2.)

However, there is no indication in this record that, upon receiving HCFA's April 24, 1996 letter or the DAB's May 26, 1996 letter, Petitioner was surprised by their references to HCFA's January 23, 1996 letter or to the fact that at least one remedy had already been

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<sup>8</sup> HCFA's April 24, 1996 letter stated, inter alia:

please note that this corrects the amount listed in our letter of January 23, 1996.... Your have 60 days from the date of our initial notice letter, dated January 23, 1996 to file an appeal . . .

Ex. D of P.'s July 12, 1996 letter (emphasis added).

effectuated by HCFA. Instead of having made inquiries concerning the whereabouts of HCFA's January 23, 1996 letter after having been placed on notice that such a letter exists, Petitioner, in a prehearing conference with me in July 1996, asserted that it was unaware of any timeliness issue. P.'s July 12, 1996 letter, 1. Petitioner's apparent inaction after having received the State Agency's notice of January 23, 1996, HCFA's notice of April 24, 1996, as well as the DAB's letter of May 29, 1996 does not credibly support its allegation that HCFA's January 23, 1993 notice had never been received either by mail or by telefax.

I do not believe Petitioner's version of the facts also because Petitioner has never offered any explanation as to how, if no copy of HCFA's January 23, 1996 notice had been received until HCFA appended it to the motion to dismiss, Petitioner knew to submit a hearing request on May 6, 1996. None of the notices Petitioner admitted to having received prior to May 6, 1996 (including HCFA's April 24, 1996 notice) contained any explanations or instructions on filing a hearing request. Yet, on May 6, 1996, Petitioner sent a hearing request addressed exactly as instructed in HCFA's January 23, 1996 notice. HCFA Ex. 3, 4.

In sum, Petitioner's evidence is insufficient to rebut the presumed receipt date which is specified by regulation and further supported by HCFA's evidence. Petitioner has not proven that the notice in issue was first received some time after January 28, 1996 and within 60 days prior to the filing of its hearing request dated May 6, 1996.

**D. Even if I were to accept as true Petitioner's contention that it did not receive HCFA's January 23, 1996 notice until HCFA filed a copy of it as an exhibit in support of HCFA's motion to dismiss, I would conclude that no hearing request conforming to the requirements of 42 C.F.R. § 498.40(b) was timely filed by Petitioner.**

**1. Under Petitioner's version of the facts, Petitioner's hearing request was not filed within 60 days after it alleged it received HCFA's January 23, 1996 notice, as required by the Act and the regulations.**

Even if I were to disregard the evidence presented by HCFA and the presumed receipt date specified by regulation, the facts alleged by Petitioner would still lead me to the conclusion that Petitioner has failed to file a hearing request within the time period specified by the statute and regulations.

Under the relevant sections of the Act and regulations, a hearing request may be filed only after receipt of the determination under challenge. Section 205(b) of the Act; 42 C.F.R. §§ 498.5, 498.40. There is no regulatory or statutory authority for filing a hearing request in advance of receiving notice of that determination. An entity may not file a non-specific hearing request before receiving an adverse determination in the hope that, if it ever receives an adverse determination made against it in later days, the anticipatory hearing request will entitle it to a hearing. *Id.* In addition, the regulation's requirements concerning the contents of the hearing request (42 C.F.R. § 498.40(b)) also preclude the filing of a non-specific hearing request in advance of the entity's having received and read HCFA's determination.<sup>9</sup>

Yet, under the facts alleged by Petitioner, Petitioner took those anticipatory actions precluded by 42 C.F.R. § 498.40 and section 205(b) of the Act. Petitioner alleges that it filed a hearing request on May 6, 1996 without having received HCFA's notice of adverse determination dated January 23, 1996. Petitioner allowed the Departmental Appeals Board (DAB) to docket its hearing request as a challenge to HCFA's January 23, 1996 notice. The acknowledgement letter dated May 29, 1996 from the DAB to Petitioner specifically references the January 23, 1996 notice letter from HCFA. However, Petitioner now says it had not received the January 23, 1996 notice even at the time the case was docketed. Yet, Petitioner did not object to nor even mention that it believed that the May 29, 1996 acknowledgement letter was inaccurate in mentioning the January 23, 1996 notice letter. Petitioner now wants the hearing to proceed on the merits of HCFA's January 23, 1996 notice, based on a non-specific request for hearing filed several months prior to its having alleged it received or read any copy of HCFA's January 23, 1996 notice.

My authority to dismiss a hearing request is not limited to those requests filed too late. I am authorized to dismiss all hearing requests that are not "timely" filed. 42 C.F.R. § 498.70(c). Since a "timely" filing means only a filing made within 60 days after receipt of the disputed determinations, the filing of a hearing request several months prior to the receipt of the disputed determinations is "untimely" as a matter of law. Section 205(b) of the Act; 42 C.F.R. § 498.40(a).

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<sup>9</sup> I will discuss in greater detail below the content requirements of the regulations and the contents of Petitioner's hearing request.

2. In addition, no hearing request containing the information required by 42 C.F.R. § 498.40(b) was ever filed within 60 days of Petitioner's having received a copy of HCFA's January 23, 1996 notice in conjunction with HCFA's motion to dismiss.

A timely filed hearing request is not merely a document of any content filed by an affected entity within 60 days of receiving any adverse determination. A timely filed hearing request means a document which is filed by an affected entity within the specified period of time after receipt and which contains the information specified by regulations:

(b) Content of request for hearing. The request for hearing 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.

42 C.F.R. § 498.40(b). Petitioner's May 6, 1996 hearing request (dated May 6, 1996) fails to satisfy the foregoing regulatory requirements. Therefore, the request submitted by Petitioner on May 6, 1996 is not a hearing request within the definition of the regulation, regardless of how many days separate its filing from the date Petitioner received any adverse determination from HCFA.

No matter when Petitioner received HCFA's January 23, 1996 notice letter, the vague content of the May 6, 1996 hearing request precludes it from being considered a timely filed hearing request under 42 C.F.R. § 498.40 for challenging HCFA's January 23, 1996 determinations.<sup>10</sup> Even if I were to accept as true Petitioner's assertions that it did not receive a copy of HCFA's January 23, 1996

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<sup>10</sup> This conclusion is applicable also to any hearing Petitioner may have been entitled to request on any determination contained in HCFA's April 24, 1996 notice. Even if, despite Petitioner's failure to allege it, Petitioner's May 6, 1996 letter might be considered as possibly relating to the merits of HCFA's April 24, 1996 notice, the letter must also be considered an untimely filed hearing request under the requirements of 42 C.F.R. § 498.40(b).

notice until HCFA filed it with HCFA's motion to dismiss, more than 60 days have passed since that date. As part of its motion to dismiss dated August 21, 1996, HCFA sent an incomplete copy of the January 23, 1996 notice letter to Petitioner as HCFA Ex. 1. (HCFA later substituted a complete copy as HCFA Ex. 4.) However, even the incomplete copy HCFA submitted as its HCFA Ex. 1 contained relevant information concerning Petitioner's appeal rights, including a citation to 42 C.F.R. § 498.40. HCFA Ex. 1 at 2. Even though HCFA's Exhibit 1 does not state what information the hearing request must contain, the document's citation to 42 C.F.R. § 498.40 placed Petitioner on notice as to what the hearing request must contain.

Therefore, there is no basis for concluding that, after Petitioner received service of HCFA Ex. 1 as part of HCFA's motion to dismiss dated August 21, 1996, Petitioner remained without notice that it had 60 days after receipt of the notice letter in issue to file a hearing request containing the information specified by 42 C.F.R. § 498.40(b). Within 60 days of the receipt date indicated by Petitioner's arguments, Petitioner has submitted no hearing request containing the information specified by 42 C.F.R. § 498.40(b) to challenge the contents of HCFA's January 23, 1996 notice.

#### CONCLUSION

For the reasons stated above, I dismiss Petitioner's hearing request dated May 6, 1996 and the above-captioned case pursuant to 42 C.F.R. § 498.70(c).

/s/

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Mimi Hwang Leahy  
Administrative Law Judge