

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Borger I Enterprises, LLC, d/b/a  
Caprock Nursing & Rehabilitation,  
(CCN: 67-6341),

Petitioner,

- v. -

Centers for Medicare & Medicaid Services.

Docket No. C-14-1291

ALJ Ruling No. 2014-38

Date: August 13, 2014

**ORDER OF DISMISSAL**

I dismiss the hearing request of Petitioner, Borger I Enterprises, LLC, d/b/a Caprock Nursing & Rehabilitation, because it was untimely and Petitioner did not establish that there was good cause to extend the filing deadline.

**I. Background and Procedural History**

Petitioner is a skilled nursing facility doing business in the State of Texas.<sup>1</sup> On April 8, 2013, Novitas Solutions, Inc. (Novitas), a contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), received an application from Petitioner to enroll in the Medicare program. On November 6, 2013, CMS notified Petitioner that it met the requirements for participation in the Medicare program and that the effective date of its enrollment was May 29, 2013. Petitioner, believing that the effective date should have been April 16, 2013, requested reconsideration on December 5, 2013. On December 10,

---

<sup>1</sup> Skilled nursing facilities are considered providers for the purposes of the Medicare program. 42 C.F.R. § 400.202 (definition of *Provider*).

2013, CMS issued an unfavorable reconsidered determination upholding the May 29, 2013 effective date.

In a letter dated May 12, 2014, Petitioner requested a hearing before an administrative law judge (ALJ) to challenge the reconsidered determination. Petitioner sent its request to the CMS Dallas Regional Office, Division of Survey and Certification, who then forwarded the request to the Civil Remedies Division (CRD) of the Departmental Appeals Board. Petitioner's hearing request included six exhibits marked as Exhibits 1, 2A, 2B, and 3-5. CRD received the hearing request on June 9, 2014. The CRD Director administratively assigned this case to me for hearing and decision.

An initial review of the hearing request revealed that Petitioner submitted it after the 60-day filing deadline required by 42 C.F.R. § 498.40(a)(2). Because Petitioner did not provide an explanation as to the apparent delay in filing the hearing request, my June 13, 2014 Acknowledgment and Order to Show Cause directed Petitioner to provide good cause why I should not dismiss the hearing request as untimely. Petitioner filed its response on June 18, 2014, which included its brief (P. Resp. Br.) and a copy of its previously submitted exhibits marked as Exhibits 1, 2A, 2B, and 3-5.

I have considered all of Petitioner's submissions in reaching my conclusion. While the regulations do not permit an aggrieved provider to file new documentary evidence at this level of review, a provider or supplier may do so upon a showing of good cause. 42 C.F.R. § 498.56(e)(1). The new documents Petitioner submitted directly relate to its argument about whether good cause exists to extend the deadline for filing its hearing request. That issue was not and could not have been before the hearing officer at the reconsideration level of review. Therefore, I will consider the documents Petitioner submitted for the first time at this level of review for the limited purpose of whether good cause exists to extend the deadline for filing Petitioner's hearing request.

## **II. Issues**

The general issue presently before me is whether I should dismiss Petitioner's hearing request. The specific issues that I must decide are whether Petitioner's hearing request was untimely and, if so, whether Petitioner had good cause for filing the request late.

## **III. Analysis**

A provider dissatisfied with a reconsidered determination "is entitled to a hearing before an ALJ." 42 C.F.R. § 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8). However, in order for a provider to exercise the right to a hearing, a provider must file its request for hearing no later than 60 days from the date that it receives a reconsidered determination from CMS. 42 C.F.R. § 498.40(a)(2). Receipt of the notice of a reconsidered determination is presumed to be five days after the date of notice unless shown otherwise. *Id.*; 42 C.F.R.

§ 498.22(b)(3). A provider may request that an ALJ extend the date to file a hearing request; however, the provider must show good cause in order for the ALJ to grant such a request. *Id.* § 498.40(c). If a hearing request is untimely and there is no good cause to extend the filing date, then an ALJ may dismiss the hearing request. *Id.* § 498.70(c).

***A. Petitioner filed an untimely hearing request.***

The reconsidered determination is dated December 10, 2013. Under the regulations, I presume that Petitioner received the determination on December 16, 2013.<sup>2</sup> Petitioner had 60 days, until February 14, 2014, in which to file a hearing request. *See* 42 C.F.R. § 498.40(a)(2). On May 12, 2014, Petitioner filed a document I interpret to be a request for a hearing. However, Petitioner filed that document 87 days after the filing deadline.

In response to the Acknowledgment and Order to Show Cause, Petitioner claims that once it became aware of the May 29, 2013 effective date it contacted its congressman's office and also began exchanges with CMS officials. Petitioner claims further that it has a "plethora of emails" showing its "dispute of the incorrectly issued effective date." P. Resp. Br. at 1. The gravaman of Petitioner's argument is that its correspondence with CMS and Novitas, which presumably occurred during the 60-day window for filing a hearing request, should be found to qualify as a hearing request. Although Petitioner did not submit any emails with its response brief, a copy of email correspondences between Petitioner, CMS, and Novitas were submitted by Petitioner with its May 12, 2014 hearing request and cover communications during the period of March 17, 2014 through May 22, 2014. Petitioner did not mark the emails as an exhibit. The first email, dated March 17, is from Petitioner to CMS and was sent 31 days after the February 14 regulatory deadline for Petitioner to file its request for hearing. Moreover, none of the eight emails Petitioner submitted in this proceeding show that Petitioner requested a hearing. At no point in the email correspondences does Petitioner express an interest in having a hearing to challenge its assigned effective date determination. For example, on April 9, 2014, Petitioner sent an email to Novitas stating that the effective date determination was an "issue that we have been struggling with for quite some time . . ." and asking "could you advise on where we would need to go to reach a resolution on this? We are spinning in circles and don't know what to do."

The April 9 email and the other seven emails from Petitioner appear to be attempts by Petitioner to convince CMS to change the May 29 effective date, but they show no intent by Petitioner to file a hearing request. Moreover, in addition to not expressing any intent to file a hearing request, the emails do not meet the content requirements for hearing requests at 42 C.F.R. § 498.40(b)(1) and (2).

---

<sup>2</sup> Five calendar days following the reconsidered determination fell on a Sunday. Accordingly, I presume that Petitioner received the determination on the following day. Civil Remedies Division Procedures § 6.

A 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.

*Id.* § 498.40(b)(1),(2) .

Aside from the fact that the emails were outside the 60-day regulatory window for Petitioner to file its hearing request, I find no basis to construe the emails between Petitioner, CMS, and Novitas as an attempt to request a hearing. Rather, the emails show that Petitioner was attempting to resolve the matter informally with CMS and Novitas. Consequently, I find that Petitioner did not file a timely request for hearing.

***B. Petitioner did not establish good cause for failing to file its hearing request timely.***

If a provider establishes that there was good cause to extend the filing date for a hearing request, then an ALJ can accept an otherwise untimely hearing request. 42 C.F.R. § 498.40(c). The regulations do not define what constitutes “good cause” to extend the filing deadline for a hearing request and the Departmental Appeals Board “has never attempted to provide an authoritative or complete definition of the term ‘good cause’ in section 498.40(c)(2).” *Brookside Rehab. & Care Ctr.*, DAB No. 2094, at 7 n.7 (2007) (citing *Glen Rose Med. Ctr. Nursing Home*, DAB No. 1852, at 7 n.5 (2002)).<sup>3</sup> Rather, a review of the relevant circumstances of each case is critical to determine whether there is “good cause” to extend the filing deadline. *See NBM Healthcare, Inc.*, DAB No. 2477, at 3 (2012) (“[T]he facts of this case do not show good cause under any reasonable definition of that term.”); *see also Quality Total Care, LLC d/b/a The Crossings*, DAB No. 2242, at 4-5 n.4 (2009) (same).

In response to the Acknowledgement and Order to Show Cause, Petitioner states that it made a “mistake” by not filing its hearing request sooner. P. Resp. Br. at 1. Petitioner explains that it “simply misunderstood the letter’s request and believed that [it was] in fact appealing the decision by working directly with CMS.” *Id.* Petitioner claims that if

---

<sup>3</sup> Departmental Appeals Board decisions cited in this decision are accessible on the Department of Health and Human Services’ website at: <http://www.hhs.gov/dab/decisions/index.html>.

its request is dismissed it will face a “substantial forfeiture,” involving the loss of \$250,000. *Id.* at 1; Hearing Request.

Despite Petitioner’s claim that it “misunderstood the letter’s request” (P. Resp. Br. at 1), a review of the December 10, 2013 reconsidered determination shows that it clearly stated that Petitioner had 60 days from receipt of the determination to request a hearing.

If you disagree with our determination, you may request a hearing before an administrative law judge of the Department of Health and Human Services, Departmental Appeals Board. Procedures governing this process are set out in 42 CFR 498.40, et seq. A written request for hearing must be filed no later than 60 days from the date of receipt of this letter.

Additionally, the December 10 reconsidered determination provided the specific address where Petitioner was to mail its hearing request to and also noted:

A request for hearing should identify the specific issues, and findings of fact and conclusions of law with which you disagree. It should also specify the basis for contending that the findings and conclusions are incorrect. Borger I Enterprises, LLC d/b/a Caprock Nursing and Rehabilitation may be represented at a hearing by counsel at your own expense.

Moreover, the reconsidered determination also provided Petitioner with the name, phone number, and email address of a contact person Petitioner could call for any questions.

The reconsidered determination explicitly advised Petitioner of its right to request a hearing from that determination. Petitioner does not explain why it disregarded this clear notice of its further appeal rights.

I conclude that Petitioner’s proffered reason for failing to file a timely hearing request does not constitute good cause to extend the filing deadline. *See Kids Med (Delta Medical Branch)*, DAB No. 2471 (2012) (holding that negligence by a facility’s staff or representative is never good cause for failing to file a timely hearing request even if the petitioner was not represented by an attorney at the time). Moreover, dismissal of a hearing request is appropriate where the reconsidered determination clearly explained the filing requirements and deadlines to the petitioner. *See Vanguard Vascular & Vein, PLLC, Trent E. Proffitt, M.D., and Franklin S. Yau, M.D.*, DAB No. 2523 (2013) (upholding dismissal when the reconsidered determination correctly explained in “unambiguous and conspicuous language” that the petitioners had 60 days from their receipt of the reconsidered determination to request a hearing before an ALJ); *Waterfront*

*Terrace, Inc.*, DAB No. 2320, at 6, 8 (2010) (holding that no good cause existed to justify extending the filing deadline where the notice letter reasonably informed the Petitioner of its appeal rights). Because Petitioner has made no showing of good cause for filing its hearing request almost three months after the expiration of the 60-day deadline for doing so, I do not have the authority to extend the filing deadline for the hearing request.

#### **IV. Conclusion**

Petitioner filed an untimely request for hearing and did not show that there was good cause for extending the filing deadline. Therefore, I dismiss Petitioner's hearing request.

\_\_\_\_\_  
/s/  
Scott Anderson  
Administrative Law Judge