

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

West Side House LTC Facility,  
(CCN: 22-5500),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-644

ALJ Ruling No. 2016-19

Date: September 9, 2016

**DISMISSAL**

For the reasons set forth below, I dismiss as untimely the hearing request filed by Petitioner, West Side House LTC Facility.

**Background**

The following facts are not in dispute:

Petitioner is a skilled nursing facility located in Worcester, Massachusetts, that participates in the Medicare program. The Massachusetts state survey agency surveyed the facility on December 29, 2015, January 4, 2016, February 24, 2016, and March 8, 2016. Based on findings from these surveys, the Centers for Medicare & Medicaid Services (CMS) determined that the facility was not in substantial compliance with Medicare requirements. CMS Ex. 1. In a notice letter dated March 10, 2016, CMS advised Petitioner that the facility was not in substantial compliance and that CMS was therefore imposing remedies, including civil money penalties (CMPs) of \$1,450 per day

for 57 days (December 29, 2015 – February 23, 2016) and \$250 per day from February 24 until the facility achieved substantial compliance. CMS Ex. 1.<sup>1</sup>

A section of the notice letter – prominently captioned “**APPEAL RIGHTS**” – advises the facility of its right to request a hearing before an administrative law judge (ALJ): “If you disagree with the determination made based on the December 29, 2015, January 4, 2016, February 24, 2016, and/or March 8, 2016 surveys, you or your legal representative may request a hearing before an [ALJ] . . . .” The letter then cites the regulations that govern such appeals – 42 C.F.R. § 498.40 *et seq.* The letter warns that “an appeal/request for hearing must be filed no later than sixty (60) calendar days from the date of your receipt of this letter.” CMS Ex. 1 at 4. The letter instructs the facility to file its hearing request electronically and explains how to do so. CMS Ex. 1 at 5. It also advises Petitioner that filing an appeal does not stop CMS from imposing a penalty. CMS Ex. 1 at 4.

CMS sent the notice letter by USPS, and the facility received it on March 14, 2016. CMS Ex. 3.

In a letter dated and filed June 17, 2016, Petitioner requested a hearing. CMS now moves to dismiss the request as untimely, which Petitioner opposes.<sup>2</sup>

## **Discussion**

*Petitioner is not entitled to a hearing because it did not file a timely hearing request, and no good cause justifies extending the time for filing.*<sup>3</sup>

Section 1866(h) of the Social Security Act authorizes administrative review of determinations that a provider fails to comply substantially with Medicare program requirements “to the same extent as is provided in section 205(b) of the [Act].” 42 U.S.C. § 1395cc(h)(1). Under section 205(b), the Secretary of Health and Human Services must provide reasonable notice and opportunity for a hearing “upon request by [the affected party] who makes a showing in writing that his or her rights may be prejudiced” by the Secretary’s decision. 42 U.S.C. § 405(b)(1). The hearing request

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<sup>1</sup> CMS subsequently determined that the facility achieved substantial compliance as of March 9, 2016. CMS Ex. 2.

<sup>2</sup> CMS accompanied its motion and brief with three exhibits (CMS Exs. 1-3). With its response (P. Br.), Petitioner filed one exhibit (P. Ex. 1).

<sup>3</sup> I make this one finding of fact/conclusion of law.

“*must* be filed within sixty days” after receipt of the notice of CMS’s determination. *Id.* (emphasis added). The 60-day time limit is thus a statutory requirement. *See Cary Health and Rehab. Ctr.*, DAB No. 1771 at 8-9 (2001).

Similarly, the regulations mandate that the affected party “file the request in writing within 60 days from receipt of the notice . . . unless that period is extended . . . .” 42 C.F.R. § 498.40(a)(2). On motion of a party, or his/her own motion, the ALJ may dismiss a hearing request where that request was not timely filed and the time for filing was not extended. 42 C.F.R. § 498.70(c).

No one disputes that the facility received its notice on March 14, which means that its hearing request was due no later than May 13, 2016. Petitioner’s June 17 hearing request was therefore untimely and, absent a showing of good cause for my extending the time in which to file, should be dismissed pursuant to 42 C.F.R. § 498.70.

Good cause. Petitioner argues that it reasonably believed that a health insurance specialist from CMS extended the time for filing the appeal. P. Br. at 4-5. Nothing in the record supports this claim.

According to Petitioner, the facility requested independent informal dispute resolution (IIDR), and an IIDR committee recommended that CMS overturn two “G-level deficiencies.”<sup>4</sup> P. Br. at 4. An email dated May 16, 2016, from the facility’s regional executive director/owner to a CMS health insurance specialist, describes an earlier (“Wednesday last week”) telephone conversation between the two. In that conversation (according to the email):

- the executive director asked if the IIDR committee’s recommendation would affect the amount of the CMP;
- the CMS health insurance specialist told him that removing the G-level deficiencies would lower the amount of the CMP;
- the executive director asked if he should nevertheless mail the full payment to CMS, and the CMS health insurance specialist told him “to wait and allow [her] time to review the case.”

Second attachment to hearing request. Alluding to a March 24 letter from CMS, the executive director pointed out that the deadline for his paying the CMP was May 19. Otherwise he would be liable for interest at an annual rate of 9.75%, which he wanted to avoid. *Id.*

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<sup>4</sup> Scope and severity level G represents an isolated instance of substantial noncompliance that causes actual harm.

Two days later, in an email dated May 18, the CMS health insurance specialist advised the facility that the G-level deficiencies would remain and that payment of the CMP would be due on or before June 18, 2016. *Id.*

Nothing in that May 16 email or elsewhere suggests that anyone discussed extending the deadline for Petitioner's requesting a hearing. In fact, the March 24 letter says that interest on the CMP would accrue at 9.75% rate "*if an appeal is not filed, or a check is not received*" by May 19. CMS Ex. 2 at 2 (emphasis added). From this and the contents of the May 16 email, I can reasonably infer that Petitioner did not then intend to appeal, but did not want to pay immediately the full amount of the CMP (\$86,150) in case CMS lowered it based on the IIDR recommendation. At the same time, Petitioner wanted to avoid paying 9.75% interest. It appears that CMS accommodated Petitioner's request and delayed the payment due date.

CMS's March 10 notice letter was not ambiguous, and the evidence establishes that Petitioner well knew when its hearing request was due. Petitioner had no reason to think that the deadline had been extended because no one from CMS or anywhere else suggested that it had been.

Moreover, as Petitioner should have known, the CMS insurance specialist had no authority to extend the filing period. The regulations that govern these proceedings – which are cited in the notice letter – specifically direct the affected party to file its request for extension *with the ALJ* and provide that *the ALJ* has the authority to extend the time for filing. 42 C.F.R. § 498.40(c); *see Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63 (1984) (holding that those who participate in the Medicare program are supposed to understand program rules).

In light of CMS's explicit instructions and in the absence of any evidence suggesting that the appeal deadline was extended, I find not credible Petitioner's claim that the executive director thought that CMS had extended the deadline for requesting an ALJ hearing. Moreover, even if I accepted his claim that he misunderstood the deadline, I find such a "misunderstanding" wholly unreasonable.

**Conclusion**

Because Petitioner did not request a hearing within sixty days of receiving the March 10, 2016 notice letter, and no good cause justifies my extending the time for filing, I dismiss its request pursuant to 42 C.F.R. § 498.70(c).

                    /s/                      
Carolyn Cozad Hughes  
Administrative Law Judge