

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Corpus Christi Nursing and Rehabilitation Center,
(CCN: 67-6107),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-1842

Decision No. CR3640

Date: February 11, 2015

DECISION REMANDING AND DISMISSING

The request for hearing filed by Petitioner, Corpus Christi Nursing and Rehabilitation Center, on August 31, 2014, is dismissed pursuant to 42 C.F.R. § 498.70(b). This case is remanded to the Centers for Medicare & Medicaid Services (CMS) pursuant to 42 C.F.R. § 498.56(d). Pursuant to 42 C.F.R. § 498.72, I may vacate the dismissal of a request for hearing if a party files a written request within 60 days of receipt of this decision and shows good cause. The dismissal of this case is without prejudice to Petitioner's right to request review pursuant to 42 C.F.R. pt. 498 in the event any CMS action on remand triggers such right.

I. Background

Petitioner is located in Corpus Christi, Texas, and participates in Medicare as a skilled nursing facility (SNF). On October 24, 2013, the Texas state agency (state agency) conducted a survey of Petitioner's facility on behalf of CMS. The survey found that Petitioner was not in substantial compliance with program participation requirements. CMS Exhibit (Ex.) 1.

CMS sent Petitioner a notice letter dated November 25, 2013, by facsimile. The notice advised Petitioner that CMS was imposing the following enforcement remedies: a per instance civil money penalty (PICMP) of \$5,000 for noncompliance with 42 C.F.R. § 483.13(c) and a \$5,000 PICMP for noncompliance with 42 C.F.R. § 483.25; a denial of payment for new admissions (DPNA) if Petitioner did not return to substantial compliance before November 21, 2013; directed in-service training; and termination of Petitioner's provider agreement if Petitioner did not return to substantial compliance before March 24, 2014. CMS Ex. 1.

Petitioner requested a hearing before an administrative law judge (ALJ) through counsel by letter dated August 31, 2014. The case was assigned to me for hearing and decision and an Acknowledgement and Prehearing Order was issued on September 25, 2014.

On October 15, 2014, CMS moved to dismiss the case on grounds that the request for hearing was not timely filed and no good cause exists to extend the period for filing. CMS filed CMS Exhibits (CMS Exs.) 1 through 6 with its motion. Petitioner filed a response in opposition on November 4, 2014, with Petitioner's Exhibits (P. Exs.) 1 and 2. On November 10, 2014, I ordered the filing of additional evidence and briefing. On November 25, 2014, Petitioner filed the declaration of counsel and P. Ex. 3. Petitioner filed a supplemental response in opposition on December 29, 2014. No objections have been made to my consideration of CMS Exs. 1 through 6 and P. Exs. 1 through 3, and all are admitted and considered.

On December 10, 2014, I stayed further proceedings pending my ruling on the motion to dismiss.

II. Discussion

A. Applicable Law

The statutory and regulatory requirements for participation of a SNF in Medicare are found at section 1819 of the Social Security Act (Act) and at 42 C.F.R. pt. 483. Section 1819(h)(2) of the Act authorizes the Secretary of Health and Human Services (Secretary) to impose enforcement remedies against a SNF for failure to comply substantially with the federal participation requirements established by sections 1819(b), (c), and (d) of the Act. The Act requires that the Secretary terminate the Medicare participation of any SNF that does not return to substantial compliance with participation requirements within six months of being found not to be in substantial compliance. Act § 1819(h)(2)(C). The Act also requires that the Secretary deny payment of Medicare benefits for any beneficiary admitted to a SNF, if the SNF fails to return to substantial compliance with program participation requirements within three months of being found not to be in substantial compliance – commonly referred to as the mandatory or statutory DPNA. Act § 1819(h)(2)(D). The Act grants the Secretary discretionary authority to terminate a

noncompliant SNF's participation in Medicare, even if there has been less than 180 days of noncompliance. The Act also grants the Secretary authority to impose other enforcement remedies, including a discretionary DPNA, civil money penalties (CMP), appointment of temporary management, and other remedies such as a directed plan of correction. Act § 1819(h)(2)(B).

The Secretary has delegated to CMS and the states the authority to impose remedies against a long-term care facility that is not complying substantially with federal participation requirements. “*Substantial compliance* means a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.” 42 C.F.R. § 488.301 (emphasis in original). A deficiency is a violation of a participation requirement established by sections 1819(b), (c), and (d) of the Act or the Secretary's regulations at 42 C.F.R. pt. 483, subpt. B. Noncompliance refers to any deficiency that causes a facility not to be in substantial compliance. 42 C.F.R. § 488.301. State survey agencies survey facilities that participate in Medicare on behalf of CMS to determine whether the facilities are complying with federal participation requirements. 42 C.F.R. §§ 488.10-.28, 488.300-.335. The regulations specify the enforcement remedies that CMS may impose if a facility is not in substantial compliance with Medicare requirements. 42 C.F.R. § 488.406.

The Act and regulations make a hearing before an ALJ available to a long-term care facility against which CMS has determined to impose an enforcement remedy. Act §§ 1128A(c)(2), 1866(h); 42 C.F.R. §§ 488.408(g), 498.3(b)(13). A facility has a right to appeal a “certification of noncompliance leading to an enforcement remedy.” 42 C.F.R. §§ 488.408(g)(1); 488.330(e), 498.3. The hearing before an ALJ is a *de novo* proceeding, i.e., “a fresh look by a neutral decision-maker at the legal and factual basis for the deficiency findings underlying the remedies.” *Life Care Ctr. of Bardstown*, DAB No. 2479 at 32 (2012) (citation omitted); *The Residence at Salem Woods*, DAB No. 2052 (2006); *Cal Turner Extended Care*, DAB No. 2030 (2006); *Beechwood Sanitarium*, DAB No. 1906 (2004); *Emerald Oaks*, DAB No. 1800 at 11 (2001); *Anesthesiologists Affiliated*, DAB CR65 (1990), *aff'd*, 941 F.2d 678 (8th Cir. 1991). The procedures applicable are established by 42 C.F.R. pt. 498.

B. Issue

Whether Petitioner's request for hearing should be dismissed.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent facts and analysis.

1. **Petitioner was never notified of the CMS initial determination by mail as required by 42 C.F.R. § 498.20(a)(1).**
2. **Remand is appropriate to permit CMS to provide Petitioner proper notice of its initial determination by mail as required by 42 C.F.R. § 498.20(a)(1), or to take other action CMS deems appropriate.**
3. **The request for hearing is dismissed without prejudice to Petitioner's right to request a hearing in the event the CMS action on remand triggers such right.**

a. Facts

The state agency surveyed Petitioner's facility on October 24, 2013, and concluded that Petitioner was not in substantial compliance with program participation requirements. CMS sent Petitioner a notice letter dated November 25, 2013, by facsimile. Printed on the letter is the following:

**THIS SERVES AS OFFICIAL NOTICE SENT VIA
FACSIMILE PURSUANT TO 42 CFR 488- NO HARD
COPY TO FOLLOW.**

The letter was notice of the CMS initial determination imposing enforcement remedies based on the findings and conclusions of the survey completed on October 24, 2013. The notice advised Petitioner of its right to request informal dispute resolution within ten days of the date on the notice letter. The notice advised Petitioner of its right to request review by an ALJ within 60 days of the date the notice was transmitted. CMS Ex. 1. There is no dispute that CMS sent the notice to Petitioner by facsimile at about 6:28 p.m. on November 25, 2013. CMS Ex. 2. Petitioner alleges that Petitioner's management did not receive the facsimile. There is no dispute that CMS did not send the notice to Petitioner by mail.

CMS sent Petitioner another notice dated February 5, 2014. The notice contains the following:

**THIS SERVES AS OFFICIAL NOTICE SENT VIA
FACSIMILE PURSUANT TO 42 CFR 488- NO HARD
COPY TO FOLLOW.**

The February 5, 2014 notice advised Petitioner that the state agency determined that Petitioner returned to substantial compliance with program participation requirements on November 20, 2013. Therefore, the proposed enforcement remedies of termination and a DPNA were rescinded. The PICMP of \$10,000 remained. The notice stated that

January 24, 2014, was the last day for Petitioner to request a hearing or waive its right to a hearing in exchange for a reduction of the PICMP, but there was no record that Petitioner had requested a hearing. Petitioner was advised that the PICMP was, therefore, due and payable as of February 20, 2014. CMS Ex. 3. There is no dispute that on February 5, 2014, at about 5:16 p.m. the letter was sent to Petitioner by facsimile and receipt was acknowledged by reply facsimile at about 5:28 p.m. by Antonio Villanueva, Petitioner's Administrator or authorized representative. CMS Ex. 4. There is no dispute that the February 5, 2014 notice was not sent to Petitioner by mail.

On April 16, 2014, CMS sent Petitioner's attorney in this case an email with copies of the November 25, 2013 and February 5, 2014 notices attached. Petitioner's attorney acknowledged receipt by reply email on April 16, 2014. CMS Ex. 6. Petitioner's counsel acknowledged that he was retained in November 2013 to assist Petitioner with the October 24, 2013 survey. However, he states that he first received a copy of the CMS notice letters as email attachments on April 16, 2014. Declaration of Michael D. Seale, dated November 24, 2014.

Jimmy Carter stated in his declaration dated November 4, 2014, that he was Petitioner's administrator from April 1, 2013, through April 1, 2014. He stated that the state agency provided a copy of the survey report related to the October 24, 2013 survey attached to a letter dated November 7, 2013. However, he testified that he first saw the November 25, 2013 CMS letter in August 2014, after he was no longer employed by Petitioner. He stated that he was not aware of Petitioner receiving the November 25, 2013 CMS letter by facsimile. P. Ex. 1. Brian Gregory stated in his declaration dated November 4, 2014, that he was director of nursing for Petitioner from September 24, 2013, until April 15, 2014. He also stated that the state agency provided a copy of the survey report on November 7, 2013. He stated that he first saw the November 25, 2013 CMS notice in August 2014, after he was no longer employed by Petitioner. He also stated that he was unaware of Petitioner receiving the November 25, 2013 CMS notice by facsimile. P. Ex. 3. I have no reason to doubt the credibility of either Jimmy Carter or Brian Gregory.

b. Analysis

The CMS letter dated November 25, 2013, was the CMS notice of its initial determination to impose enforcement remedies based on the findings and conclusions of the survey completed on October 24, 2013. CMS Ex. 1. There is no evidence that the November 25, 2013 CMS letter was sent to Petitioner by mail. There is also no evidence that the February 5, 2014 CMS letter was sent to Petitioner by mail. In fact, the notices clearly state that no "hard copy" of the letters was sent by CMS to Petitioner. The declaration of Petitioner's counsel is consistent with the other evidence that no copy of either letter was ever sent to Petitioner by mail and counsel received copies as email attachments and not by mail.

Pursuant to 42 C.F.R. § 488.402(f) CMS must give notice that it intends to impose an enforcement remedy. The notice must state the nature of the noncompliance that is the basis for imposing the enforcement remedy; which enforcement remedy is imposed; the effective date of the remedy; and the right to appeal the determination to impose the remedy. For a CMP, the notice must comply with 42 C.F.R. §§ 488.434 and 488.440. 42 C.F.R. § 488.402(f)(6). Pursuant to 42 C.F.R. § 488.434, when a CMP is being imposed, CMS must send a written notice to the facility. The notice must state the noncompliance that is the basis for imposing the CMP; the statutory basis for imposing the CMP; the amount of the CMP per day or per instance; the factors considered when determining the amount of the CMP; the date of the instance of noncompliance or the date on which the CMP began to accrue; the date the CMP stops accruing if applicable; when the penalty is to be collected; and instructions for responding to the notice, including the right to a hearing or to waive a hearing and receive a discount in the CMP amount. Additional notice requirements are established by 42 C.F.R. § 488.440(d) and (e).

A facility may appeal a certification of noncompliance that is the basis for imposition of an enforcement remedy. The procedures for ALJ review and appeals to the Departmental Appeals Board are established by 42 C.F.R. pt. 498. 42 C.F.R. §§ 488.24; 488.330(e)(3); 488.408(g); 488.431(d).

CMS must give notice of its initial determination to impose an enforcement remedy based on noncompliance in accordance with 42 C.F.R. § 498.20(a)(1), which provides:

(a) Notice of initial determination—

(1) General rule. CMS . . . **mails** notice of an initial determination to the affected party, setting forth the basis or reasons for the determination, the effect of the determination, and the party's right to reconsideration, if applicable, or to a hearing.

(emphasis added). The regulation requires that the notice of initial determination be mailed to the affected party. No provision of 42 C.F.R. pt. 498 permits notice of an initial determination by facsimile, email, or other alternative means. The State Operations Manual (SOM), CMS Pub. 100-07, chap. 7, § 7305.4 (Sep. 2010) (<http://www.cms.hhs.gov/Manuals/IOM/list.asp>), suggests that facsimile transmission may be an acceptable alternative to sending a notice of initial determination by mail. However, the SOM does not have the force and effect of law, and may only be applied consistent with the requirements of the Act and regulations. *Ind. Dep't. of Pub. Welfare v. Sullivan*, 934 F.2d 853 (7th Cir. 1991); *Nw. Tissue Ctr. v. Shalala*, 1 F.3d 522 (7th Cir. 1993). Further, even if I were to apply the SOM, section 7305.4 requires the sender to “maintain a record of transmission to assure proof of transmission if receipt is denied.” CMS has offered proof that it transmitted a seven page document to Petitioner on

November 25, 2013, but CMS's evidence does not establish that it sent the five page November 25, 2013 notice of initial determination to Petitioner. *Compare* CMS Ex. 2, *with* CMS Ex. 1. Further, CMS has not offered proof that Petitioner actually received the documents it did send on November 25, 2013. Tellingly, CMS does not offer an acknowledgment signed by the facility's Administrator or an authorized representative, similar to that which CMS retained after transmitting the February 5, 2014 notice.

In this case, CMS failed to properly serve the November 25, 2013 notice of initial determination upon Petitioner by mail as required by 42 C.F.R. § 498.20(a)(1). Accordingly, CMS never accomplished proper service, and the running of the 60-day period for Petitioner to request ALJ review was not triggered. Petitioner has not waived the defective service.

Because CMS failed to properly serve the notice of initial determination to impose an enforcement remedy, Petitioner's right to a hearing was not triggered. Accordingly, dismissal is appropriate and this case is dismissed. 42 C.F.R. § 498.70(b). Either party may request that I vacate this dismissal for good cause within 60 days from receipt. 42 C.F.R. § 498.72. This case is remanded to CMS pursuant to 42 C.F.R. § 487.56(d), to address the defective notice of initial determination or such other action as CMS may deem appropriate. The dismissal of this case is without prejudice to Petitioner's right to request review pursuant to 42 C.F.R. pt. 498 in the event any CMS action on remand triggers such right.

III. Conclusion

For the foregoing reasons, this case is remanded to CMS and the case is dismissed.

/s/
Keith W. Sickendick
Administrative Law Judge