Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Optima Home Health Services, Inc.,	)	
(CCN: 23-7487),	)	Date: November 29, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	
	)	Docket No. C-07-671
Centers for Medicare & Medicaid	)	Decision No. CR1702
Services.	)	
	)	

DECISION DISMISSING HEARING REQUEST

For the reasons set forth below, I dismiss as untimely the hearing request filed by Petitioner, Optima Home Health Services, Inc. (hereafter Petitioner or HHA).

I. Background

Petitioner is a home health agency, located in Troy, Michigan, that participated in the Medicare program. Following a recertification survey completed December 13, 2006, and revisit survey completed January 31, 2007, the Centers for Medicare & Medicaid Services (CMS) determined that it was not in substantial compliance with program requirements. In a notice letter dated March 26, 2007, CMS advised the HHA that, based on its noncompliance, CMS would terminate the facility's provider agreement effective April 25, 2007.

The notice further advised Petitioner of its options: if it believed that it was in compliance it should so notify CMS immediately, and, if CMS found credible its allegation of compliance, it would authorize a resurvey. In the alternative, the HHA could bring itself into compliance and reapply to the program. Or it could request a hearing before an administrative law judge. The letter said:

> If you desire a hearing, *you must request it not later than 60 days from the date you receive this notice*. The request for a hearing should state why the decision is considered incorrect and should be accompanied by any evidence which you decide to bring to the attention of the hearing examiner.

(Emphasis added) CMS Ex. 1. The letter was sent via fax and certified mail. CMS Ex. 1, at 3.

In a subsequent letter, dated May 18, 2007, CMS advised the HHA that, based on the findings of a May 2, 2007 revisit, it remained out of compliance, so its Medicare participation terminated effective April 25, 2007. The letter reminded Petitioner that its appeal rights had been set forth in CMS's March 26, 2007 notice letter.

Petitioner did not request a hearing until June 17, 2007, when it sent, via fax, a letter advising that it "would like to appeal the decision of CMS to terminate our provider number." CMS Ex. 1, at 10. The fax cover sheet says "We would like to appeal [and] be heard." CMS Ex. 1, at 9. Although the letter itself is dated "05/17/07," that date is obviously incorrect. Petitioner does not claim to have filed the appeal on May 17, 2007, and its fax transmission sheet is dated "6/17/2007."

In a letter dated June 20, 2007, attorneys for Petitioner also requested "a hearing before an Administrative Law Judge . . . regarding [CMS's] May 18, 2007 final decision indicating that Optima's Medicare provider agreement is terminated as of April 25, 2007." CMS Ex. 1, at 12.

II. Discussion

Petitioner is not entitled to a hearing because it did not file a timely hearing request and did not seek an extension of time for filing.[1]

CMS has filed a motion to dismiss, arguing that Petitioner's hearing request was not timely filed. I agree.

Section 1866(h) of the Act authorizes administrative review of determinations that a provider fails to comply substantially with the program requirements "to the same extent as is provided in section 205(b) [of the Act]." Under section 205(b), the Secretary must provide reasonable notice and opportunity for a hearing "upon request by [the affected

[1] I make this one finding of fact/conclusion of law.

party] who makes a showing in writing that his or her rights may be prejudiced" by the Secretary's decision. The hearing request "must be filed within sixty days" after receipt of the notice of CMS's determination (emphasis added). Act, section 205(b). The 60 day time limit is thus a statutory requirement. *See Cary Health and Rehabilitation Center,* 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). On motion of a party, or on his or her own motion, the administrative law judge (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). Under §§ 498.40(a)(2) and 498.22(b)(3), receipt is "presumed to be 5 days after the date on the notice unless there is a showing that it was, in fact, received earlier or later."

Here, the notice language in CMS's March 26, 2007 letter is clear and unconditional: Petitioner's appeal had to be filed within 60 days of receipt. Nothing in CMS's May 18 letter suggests any alteration of that deadline. In fact, the May letter specifically reminds Petitioner that its appeal rights were set forth in the earlier correspondence. CMS Ex. 1, at 4. Since the March 26 letter was also sent by facsimile, Petitioner likely received it on March 26, but CMS does not rely on that possibility. Instead, CMS points to the presumption that the date of receipt is five days after the date of the notice. 42 C.F.R. § 498.40(a)(2). Based on that presumption, which Petitioner does not dispute, it received its notice on or before March 31, and its deadline for appeal was May 30, 2007. Petitioner first requested a hearing on June 17, 2007, so its hearing request was untimely and, absent a showing of good cause for my granting an extension of time in which to file, should be dismissed pursuant to 42 C.F.R. § 498.70.

Petition does not exactly claim that it filed a timely appeal. Instead, it argues that it and its counsel

> were in constant contact either telephonically or in written correspondence with multiple representatives of CMS, including Douglas Wolfe, persistently voicing its position that the [HHA] was diligently working to correct the deficiencies in compliance with the Medicare Conditions of Participation, or alternatively to request a hearing before an Administrative Law Judge.

P. Response at 4. Petitioner also asserts – without providing any supporting declaration or other evidence – that an unnamed representative "was told by Douglas Wolfe of CMS that [Petitioner] initiated its appeal on May 9, 2007." *Id.* In a sworn declaration, Douglas Wolfe, CMS Program Representative, challenges the accuracy of this assertion. CMS Ex.

2. Since the allegation is unsupported, I reject it. *See, Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 65 (in which the Supreme Court cautions that a Medicare supplier's purported reliance on oral advice be treated with skepticism). Further, Petitioner is vague about the timing and circumstances of Mr. Wolfe's purported representation, and has not explained how (or even if) it relied on such representation to its detriment. Its eventual filing (albeit late filing) of a written request – without any reference to any earlier filing – suggests that Petitioner did not believe it had filed a valid hearing request prior to June 17.

I have no doubt that Petitioner was in contact with CMS staff, attempting to persuade them that it was correcting its deficiencies. But nothing before me shows that it opted to file a hearing request until *after* the filing deadline had passed. Indeed, the evidence suggests that Petitioner's initial strategy was to negotiate its way out of the termination, persuading CMS not to take the action based on its promises to correct. Such a strategy is understandable inasmuch as the HHA was not claiming that it was in compliance at the time of the December and January surveys (which were the bases for the termination); rather, it was first promising to make the necessary corrections, and later claiming that the corrections had been made.

Moreover, a hearing request must be *in writing*, so conversations with CMS staff would not satisfy the regulatory requirement. 42 C.F.R. § 498.40(a).

Petitioner refers to two letters that it purportedly sent to CMS on May 9 and May 30, 2007. It submitted no copy of any May 9 letter, which is peculiar in light of its suggestion that it requested its hearing on May 9 by means of this document. However, along with its reply, CMS submits a copy of the May 9 document, which is a letter from Petitioner's counsel to CMS. CMS Ex. 3. The letter does not request a hearing; rather, it introduces counsel as Petitioner's representative, acknowledges the survey findings underlying CMS's March 26 determination, and represents that those problems have been resolved, points out that the HHA has already submitted its Plan of Correction and believes that its deficiencies have been corrected. The letter mentions no disagreement with CMS's December and January survey findings. *See* 42 C.F.R. § 498.40(b).

CMS has also submitted a copy of Petitioner's letter dated May 30, 2007, which is stamped "received" by CMS on May 31, 2007, one day after the filing deadline. Although Petitioner argues that the letter was hand-delivered on May 30, 2007 (a fact that CMS hotly disputes), it doesn't really matter when it was delivered because, like the May 9 letter, this document is not a request for hearing, and Petitioner plainly did not consider it a request for hearing. The letter responds to CMS's May 18 letter, which referenced a May 2 revisit during which the state survey agency determined that the HHA's noncompliance continued. I note that the HHA's termination was based on the findings

of the December 13, 2006 and January 31, 2007 surveys, and not the May 2 revisit. Petitioner's May 30 letter suggests misunderstandings between its staff and the May 2 surveyors, and asks that CMS review some additional evidence and reconsider its decision. CMS Ex. 1, at 6. Again, the letter identifies no issues, findings of fact, nor conclusions of law with which Petitioner disagrees. It specifies no basis for contending that the findings and conclusions underlying CMS's March 26, 2007 determination were incorrect – regulatory requirements for a hearing request. 42 C.F.R. § 498.40(b). In fact, the letter says absolutely nothing about the March 26, 2007 determination.

I note also that when Petitioner finally filed its hearing requests, on June 17 and 20, 2007, it's requests were unequivocal. It said that if CMS would not reverse its decision, "we would like to schedule a hearing before the administrative judge," (CMS Ex. 1, at 10) and "[w]e are writing to request a hearing before an Administrative Law Judge. . . ." CMS Ex. 1, at 12.

If a hearing request is not filed within 60 days, the affected party may file with the ALJ a written request for an extension of time stating the reasons why the request was not filed timely. Upon a showing of good cause, the ALJ may extend the time for filing. 42 C.F.R. § 498.40(c). Petitioner has filed no such request, and offers no credible justification for extending the filing deadline.

III. Conclusion

Because Petitioner's hearing request was untimely, I exercise my authority under 42 C.F.R. § 498.70 and dismiss this case.

/s/
Carolyn Cozad Hughes
Administrative Law Judge